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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	CASE NO.: 08-1173 HC AB Assigned to: Hon. Marilyn Huff **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT** **SPECIAL BRIEFING SCHEDULE ORDERED [CivLR 7.1 E(8)]** **Hearing:** Date: September 29, 2008 Time: 10:30 a.m. Courtroom: 13, Fifth Floor Complaint filed: May 29, 2008 First Amended Complaint filed: July 28, 2008

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 29, 2008 at 10:30 a.m., or as soon thereafter as this matter may be heard, in Courtroom 13, Fifth Floor, of the United States District Court for the Southern District of California located at 940 Front Street, San Diego, CA 92101-8900, Defendant New Albertsons, Inc. shall, and hereby does, move the Court for an Order dismissing all purported causes of action alleged by Plaintiff in the First Amended Complaint pursuant to Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is made on the grounds that each claim in the First Amended Complaint fails to state a claim upon which relief can be granted and fails to set forth the circumstances constituting the alleged wrongdoing with the required particularity. In addition, because Plaintiff lacks standing to bring this action, the Court lacks subject matter jurisdiction.

This motion is based upon this Notice of Motion and Motion, the accompanying memorandum of points and authorities, the declaration of Kathlene W. Lowe and any evidence and argument presented at the hearing of this motion.

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Dated: August 14, 2008

By: *s/ Kent J. Schmidt*
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RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	CASE NO.: 08-1173 HC AB Assigned to: Hon. Marilyn Huff **MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT NEW ALBERTSON'S, INC. IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT** **SPECIAL BRIEFING SCHEDULE ORDERED [CivLR 7.1 E(8)]** **Hearing:** Date: September 29, 2008 Time: 10:30 a.m. Courtroom: 13, Fifth Floor Complaint filed: May 29, 2008 First Amended Complaint filed: July 28, 2008

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INTRODUCTION

In this putative class action, Plaintiff Raymond W. London ("Plaintiff") complains that, after he filled prescriptions at a Sav-On drugstore owned by Defendant New Albertson's, Inc., ("Albertsons") Albertsons sold "de-identified information" about his prescriptions to "data mining companies" ("DMCs"). "De-identified information" has been stripped of all data which could identify the individual to whom the prescription was issued (name, address, telephone number, email address, social security number). That de-identified data becomes "prescriber-identifiable" after DMCs combine it with information about doctors which DMCs obtain from the American Medical Association and other sources. The resulting aggregated data (from pharmacies and from medical associations) reveals specific details about the prescribing habits of individual physicians. DMCs sell this de-identified aggregated data to pharmaceutical companies, which use that information in targeted marketing campaigns to persuade doctors to prescribe patented medications.[1]

Plaintiff alleges that Defendants' sales of de-identified data violate three California statutes: its Confidentiality of Medical Information Act ("CMIA"), Cal. Civil Code §§ 56.10 *et seq.*, its Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and, in the recently amended complaint, the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq*. None of these statutes prohibits these data sales. He asserts six common law causes of action arising from the same conduct: breach of contract and of the implied covenant of good faith and fair dealing, fraud (suppression of fact), breach of privacy, unjust enrichment, and trespass to personalty. Except for his CMIA claim, all of Plaintiff's causes of action are preempted by federal law. In addition, his statutory and privacy claims cannot survive First Amendment scrutiny.

Central to all of Plaintiff's claims are two themes: that these data sales invade his privacy rights, and that he "owns" the de-identified data about his prescriptions. Because neither premise has any basis, his entire First Amended Complaint must fail. In addition, Plaintiff lacks standing to complain of Defendants' sales of data about his doctors' prescribing practices. Each of his claims also fails for other, independently sufficient reasons.

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[1] This data is also "of considerable interest to government agencies, academic institutions, health insurance companies, health maintenance organizations, and other entities" to whom DMCs also sell this data. *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 153, 158 (D. Maine 2007); as modified, 532 F.Supp.2d 183. *Accord: IMS Health Inc. v. Ayotte*, 490 F. Supp. 2d 163, 166 (D.N.H. 2007). The Complaint speaks only about DMCs' sales to pharmaceutical companies, though, and ignores all these other salutary uses of the same data.

Plaintiff has therefore failed to state a claim upon which relief may be granted and this Court should dismiss this action with prejudice because it cannot be cured through amendment.

FACTS

Plaintiff's First Amended Complaint contains extensive allegations that have no bearing on whether Plaintiff states a claim against these defendants, and which are instead designed to provoke resentment at pharmaceutical companies. While pharmaceutical companies are a popular target (perhaps second only to oil companies), none is named as a Defendant in this case.[2]

The gravamen of these allegations is that the pharmaceutical industry combines de-identified prescription information with physician-specific data to create "prescriber-identifiable data,"[3] which pharmaceutical companies use to market prescription drugs to doctors. Plaintiff's original complaint contained **no** allegation that Defendants sell individually identifiable information about him or other pharmacy customers to any DMC. After Albertsons moved to dismiss that complaint, Plaintiff amended his pleading to allege that Albertsons "inadequately" de-identifies his data (FAC ¶¶ 2, 12, 15). This conclusory and speculative allegation, as discussed below, cannot breathe life into this case. The conduct at issue is *not* the sale of individually identifiable information about *patients*; it is instead the sale of anonymized patient data which reveals the prescribing practices of individual *doctors* – what drugs they prescribe, in what dosages, what generic substitutes they prescribe, and the like.

The allegations which describe Defendants' role in this process are sparse. A patient provides his drug prescription to a pharmacy, along with his name, address, and telephone number (FAC ¶¶ 8, 9). The DMCs which buy Albertsons' prescription data (*id.* ¶ 11) acquire that data by installing software on Albertsons' mainframe computer which captures and collates data about all prescriptions (*id.* ¶ 15). Defendants and/or DMCs remove information which could identify individual patients

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2 Defendant Albertsons owns supermarkets and pharmacies in many states. Defendant Cerberus is merely the partial owner of a company which purchased some Albertsons stores in 2006 and is therefore not even a proper defendant. Plaintiff also recently filed a Doe amendment which brought in SaveMart as a new defendant. SaveMart purchased some Northern California supermarkets from a third party in 2007.

3 See, *e.g.*, FAC ¶¶ 16, 17, 19, and 21 for references to "prescriber-identifiable data."

before transferring any data to their pharmaceutical company customers (*id.* ¶ 12).[4] A number is assigned to each de-identified patient which permits all prescription information for one patient to be correlated, but "purportedly" does not allow the patient's identity to be determined (*id.* ¶ 15). Before DMCs sell this data, they combine it with other information about the doctor who issued each prescription (*id.*). That data, obtained from the AMA and other third parties, identifies the prescriber's correct name, address, specialty, and other professional information (*id.* ¶ 16).

ARGUMENT

A. The Court Should Disregard Plaintiff's Conclusory Allegations That Defendants "Inadequately" De-Identified Prescription Data.

On June 11, 2008, Albertsons moved to dismiss the original Complaint. That motion's central theme was that Plaintiff has no claim arising from the sale of data about the prescribing habits of third parties – his physicians – which is derived from anonymous information about patients. In response to that motion, Plaintiff filed a First Amended Complaint which speculates that Defendants may instead be disclosing information which, after some investigation, could identify *him*. While the original complaint conceded that individually identifying information is removed before transmittal to DMCs, the new pleading claims that patient information is "inadequately de-identified" because pharmaceutical companies might combine that information with other "publicly or privately available" data to identify individual patients (*compare* Compl. ¶ 9, 12 *with* FAC ¶¶ 12, 15).

Nowhere in the First Amended Complaint does Plaintiff explain what data remains in place which makes its de-identification "inadequate." Furthermore, if pharmaceutical companies want this data to target *doctors*, it is nonsensical to suggest that they would waste time trying to identify individual *patients*. Plaintiff does not claim that anyone actually *does* reverse engineer the data so as to reveal patient identity; instead, we are left only with the alleged *possibility* that someone, somewhere might be able to do so.

Since Plaintiff does not allege that anyone has actually seen or will see information which

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4 This allegation is inaccurate in suggesting that DMCs *may* "see" individually identifiable information. All such information is removed at Albertsons' server *before* it is transmitted to DMCs or any other third party. However, for purposes of this motion only, Albertsons treats this allegation as true.

identifies him, his claims amount to nothing more than speculation that some snippet of potentially identifying information slipped through the cracks. This is, of course, insufficient. To survive a Rule 12(b)(6) motion, a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1965 (2007). A plaintiff's pleading obligation "requires more than labels and conclusions." *Id.* "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* at 1967. Therefore, to state a claim for relief, plaintiff must allege *facts*, and those facts must do more than "merely create[] a suspicion [of] a legally cognizable right of action." *Id.* at 1965, *quoting* 5 C. Wright & A. Miller (3d ed. 2004), *Federal Practice and Procedure* § 1216 at 235-36. The courts also, of course, disregard legal conclusions in a pleading when ruling on motions to dismiss. *Papasan v. Allain,* 478 U.S. 265, 286 (1986); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)("[A court does] not . . . necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations").

It is no mere technical defect that this complaint contains purely conclusory and speculative allegations that individual information is "inadequately de-identified." If the data is indeed anonymized (as other federal courts have recognized),[5] then Plaintiff has no claim at all. Plaintiff cannot allege facts which would support his allegation of inadequate de-identification within the constraints of Rule 11.

Twombly imposed the requirement of greater factual specificity because, among other reasons, defendants face crippling expense when courts allow "a potentially massive factual controversy to proceed." *Twombly*, 127 S.Ct. at 1967. Here, Plaintiff purports to act on behalf of an enormous class of Californians, asserting claims that, if permitted to proceed, would trigger voluminous and costly discovery. That spectre "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* This Court should not allow that to happen. Instead, it should disregard this conclusory allegation and determine each of the legal issues below based on the premise that the data involved is de-identified (*i.e.*, stripped of names, addresses, phone number and similar information) – as the original complaint alleged.

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[5] See discussion of *IMS Health Corp. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007), *appeal pending*, Case No. 07-1945 (1st Cir.), *infra* at 10-12.

B. The First Amended Complaint Fails to State a Claim for Violation of the CMIA

1. Background of the CMIA and its Legislative Intent

Subject to certain exceptions, the CMIA prohibits the use or disclosure of "medical information" without a patient's prior authorization. Civil Code §§ 56.10(a) and (d). "Medical information" is defined as "individually identifiable information." Civil Code § 56.05(g). "Individually identifiable information" is information which

> includes or contains any element of **personal identifying information** sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, **reveals the individual's identity**.

Civil Code § 56.05(g) (emphasis added). Because the statute reaches only such "individually identifiable information," Plaintiff cannot establish a CMIA violation. Once medical data is de-identified, the information is what the CMIA calls "anonymiz[ed] data – information that does not disclose "individually identifiable information." Cal. Civ. Code § 56.10(c)(16). The CMIA simply does not govern the handling of de-identified data because, by definition, that data is not "individually identifiable information."

This conclusion is supported not only by the plain language of the statute, discussed above, but also by its legislative history and case law. In 2003, the Legislature considered and debated amendments to the CMIA which added a proscription against the use of individually identifiable information for marketing (Civil Code Section 56.10(d)). These changes initially appeared in Assembly Bill 262 ("AB 262"). AB 262 contained two elements: (1) a marketing prohibition which eventually became part of Section 56.10(d), and (2) a proposed "Do Not Use" list, which would have protected participating physicians from sale of the same data at issue in this case. The first element of AB 262 was enacted in 2004, but the second element – the proposed "Do Not Use" list – was not enacted. Lowe Decl. ¶¶ 2-7 and Exhs. A-D. The proposal was that, if doctors placed their names on the "Do Not Use" list, pharmacies could not sell prescribing information about them to any third party.

The "Do Not Use" portion of AB 262 died in Conference. *Id.*, Exh. A. The Senate Committee on Business and Professions considered this proposed legislation and concluded that the "Do Not Use" provisions did not belong in the CMIA:

> **It seems clear that the CMIA was intended to apply to patient medical information and not physician prescription information** which may or may not be made available to other persons or entities depending on the specified restrictions within [the "Do Not Use" portion of AB 262].

Lowe Decl. ¶ 5 and Exh. B. This legislative history confirms that the CMIA was never intended to govern the use or transfer of information which is not individually identifiable. Plaintiff cannot seriously contend that the CMIA prohibits the transfer of de-identified data since the California Legislature chose not to adopt legislation prohibiting this very practice.

Finally, these conclusions are further corroborated by case law. Every California case interpreting and applying the CMIA has, without exception, involved the transmission of *identifiable* information to a third party, allegedly without consent. For example, in *Colleen M. v. Fertility and Surgical Associates of Thousand Oaks*, 132 Cal. App. 4th 1466 (2005), a fertility clinic disclosed a patient's medical history to her ex-fiancé in response to a subpoena; her medical and identifying information was disclosed. In *Shaddox v. Bertani*, 110 Cal. App. 4th 1406 (2003), a dentist disclosed to a police department his suspicions that a police officer was addicted to prescription pain medicine; his medical and identifying information was disclosed. *Pettus v. Cole*, 49 Cal. App. 4th 402 (1996), challenged an employer's use of psychiatric information about an employee to force him into an inpatient alcohol treatment program and ultimately to terminate his employment; his medical and identifying information was disclosed.

These cases involve the type of communications the CMIA was intended to address. Not one reported case has involved de-identified information. Plaintiff's attempt to stretch the statute beyond its intended application is unavailing as the CMIA was simply not intended to address the conduct alleged in the First Amended Complaint. Thus, even accepting all allegations as true, the CMIA claim fails as a matter of law.

2. The CMIA's Disclosure Exceptions Permit the Conduct At Issue

As discussed above, the statute contains two prohibitions: disclosure (Section 56.10(a)) and use (Section 56.10(d)). Both of those prohibitions are subject to twenty-seven separate exceptions (or "safe harbors"). Cal. Civ. Code § 56.10(b) and (c). Conduct that would otherwise be prohibited is permitted if one of the exceptions applies. Even if this Court were to conclude, notwithstanding the foregoing argument, that the CMIA extends to de-identified data, the conduct at issue falls within at least two of these exceptions. Section 56.10(c)(14) permits disclosures that are "otherwise specifically authorized by law," and Section 56.10(c)(16) allows the transfer of "anonymized" data. Both exceptions are discussed below.

(a) Section 56.10(c)(16) Expressly Permits Using a Third Party to Encode, Encrypt or "Anonymize" Data to Remove Identifying Information

Section 56.10(c)(16) provides:

> The information may be disclosed to a third party for purposes of encoding, encrypting, or otherwise anonymizing data. However, no information so disclosed shall be further disclosed by the recipient in any way that would violate this part, including the unauthorized manipulation of coded or encrypted medical information that reveals individually identifiable medical information.

Cal. Civ. Code § 56.10(c)(16). Two things are apparent from Subdivision (c)(16). First, the plain text of this exception permits a third party to receive data in order to "anonymize" it – or, in the words of the First Amended Complaint, "have the information identifying individual patients removed" (FAC ¶ 12). Second, any further disclosure – *i.e.*, a disclosure by the "anonymizer" to other third parties – must also avoid revealing individually identifiable information. This exception further confirms that the CMIA does not condemn the transfer of anonymized or "de-identified" data: it expressly allows covered entities to engage a third party to anonymize the data, and it also expressly permits those third parties to disclose that data to others, so long as it remains anonymized.

Albertsons' earlier motion to dismiss argued that this exception is fatal to Plaintiff's CMIA claim. In response, Plaintiff has added a new allegation to respond to that argument:

> Defendants do not disclose Plaintiff and the Class' proprietary and confidential information to data mining firms such as IMS and Verispan **for the purpose** of encoding, encrypting, or otherwise anonymizing such information, as such information is disclosed to IMS and Verispan under contract(s) of sale for the purpose of developing marketing programs for pharmaceutical companies.

FAC ¶ 55 (emphasis added). This allegation does not eliminate the safe harbor provided by Subdivision (c)(16).

Plaintiff alleges that either Albertsons or the DMCs de-identify the data (FAC ¶ 12). If Albertsons does so before it transmits the data to any DMC, then the CMIA does not apply at all, as the prior argument explains. If it is the DMCs who de-identify the data, then the first sentence of subsection 16 clearly permits them to do so, and the second sentence allows them in turn to disclose that anonymized data to others. Plaintiff apparently believes that the first sentence provides a safe harbor only when the de-identifier's role is to anonymize data and to do nothing else with it. Otherwise he would not now allege that Defendants disclose that data to DMCs for additional purposes (use for marketing programs). But the second sentence of Subdivision (c)(16) allows that data to be further disclosed "by the recipient" (the de-identifier) after it has been anonymized. If the de-identifier can encrypt the data but cannot do anything else with it, then the second sentence of Subsection (c)(16) is meaningless.

Moreover, Plaintiff misreads this statute. Although his new allegation in Paragraph 55 closely tracks Subdivision (c)(16), there is one important distinction. Plaintiff uses the phrase "for **the** purpose of," while the statute uses the phrase "for purpose**s** of." There is a substantive difference between the phrase "for the purpose of" and "for purposes of," as the latter denotes a more generalized connection between the conduct and the objective. *See Church Divinity School of Pacific v. Alameda County*, 152 Cal. App. 2d 496, 502 (1957)("'property used exclusively for . . . purposes of education' includes any facilities which are reasonably necessary for the fulfillment of a generally recognized function").

For these reasons, it is sufficient that the data was allegedly transferred to DMCs for de-identifying even if the de-identified data was later used for additional purposes.

(b) Section 56.10(c)(14) Expressly Permits the Conduct Alleged in the First Amended Complaint Because It Is Authorized by the Privacy Rule

Subdivision (c)(14) allows any disclosure which is otherwise specifically authorized by law. That subsection states:

> The information may be disclosed when the disclosure is otherwise specifically authorized by law, including, but not limited to, the voluntary reporting, either directly or indirectly, to the federal Food and

> Drug Administration of adverse events related to drug products or medical device problems.

Cal. Civ. Code § 56.10(c)(14). This exception expresses the California Legislature's intent that the CMIA be applied in harmony with other state and federal regulations by providing an important safe harbor to its general prohibition on disclosures of medical information. "Subdivision (c)(14) thus serves as the residuary clause in Section 56.10. It legitimizes a myriad of situations the Legislature may not have cared to spell out, by establishing the principle of permissive disclosure when specifically authorized by law." *Shaddox v. Bertani*, 110 Cal. App. 4th 1406, 1414 (2003).

The question presented in applying Subdivision (c)(14) is quite simply: *does some other state or federal regulation specifically authorize the disclosure at issue?* In *Shaddox*, the only case that has interpreted and applied Subdivision (c)(14), one of the "other laws" which authorized a disclosure was the San Francisco City Charter. The text of this subdivision and of *Shaddox* confirm that the "other law" need not be in the CMIA or even another California statute or regulation.

In this case, the conduct alleged is specifically authorized by the HIPAA[6] "Privacy Rule" promulgated by the Department of Health and Human Services ("HHS").[7] Any entity to which HIPAA applies (including Defendants) may create information that is not individually identifiable health information by using "protected health information"[8] to create de-identified health information. The information is no longer "protected health information" after it is de-identified. 45 C.F.R. § 164.502(d). Unless protected health information has been so de-identified, its use and disclosure is restricted in much the same manner as that data is restricted under the CMIA. See 45 C.F.R. § 164.502(a).

Because Subdivision (c)(14) allows disclosures "otherwise specifically authorized by law,"

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6 "HIPAA" is the federal Health Insurance Portability and Accountability Act.

7 HHS adopted the Privacy Rule pursuant to its "substantive lawmaking" authority granted by Congress and, as such, under California law the Privacy Rule is a "quasi-legislative rule" which has "the dignity of statutes." (RJN Ex. 2 at p. 53182, I(A) Para. 2 [67 Fed. Reg. 53182 (Aug. 14, 2002), codified at 45 C.F.R. pts. 160, 164]) *See Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 10, 11 (1998) (distinguishing substantive lawmaking from interpretative acts and observing that the former has "the dignity of statutes").

8 "Protected health information" is the HIPAA equivalent of the CMIA's "individually identifiable information." It is so defined at 45 C.F.R. § 164.501.

including federal law, the sale of de-identified data alleged in the First Amended Complaint falls within the safe harbor of subdivision (c)(14). Therefore, even if the CMIA were deemed to apply to this conduct, the First Amended Complaint fails to state a violation of the statute.

C. Even if the CMIA Were Read to Prohibit the Conduct At Issue, the First Amendment Prevents Its Application to Anonymized Data.

Maine and New Hampshire attempted to regulate the sale of de-identified data. Both states' statutes failed to withstand First Amendment challenge. Accordingly, even if this Court were to conclude that the CMIA prohibits the sale of de-identified data, it should reach the same result as the two courts that have thoughtfully considered these constitutional challenges.

In *IMS Health Corp. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007), *appeal pending* (1st Cir. Case No. 07-1945), IMS challenged New Hampshire's Prescription Information Law[9] based on the First Amendment's guarantee of free speech. That statute barred pharmacies and other entities from transferring or using prescriber-identifiable data for certain commercial purposes. The federal court agreed with IMS that the statute unduly restrained commercial speech, and therefore issued a permanent injunction against enforcement of the law.[10]

More recently, the Maine federal district court relied on *Ayotte* to conclude that Maine's similar law was likewise unenforceable because of the First Amendment. *IMS Health Corp. v. Rowe*, 532 F. Supp. 2d 153 (D. Me. 2008), *appeal pending* (1st Cir. Case No. 08-1248). Because the Maine decision follows the logic of *Ayotte*, only *Ayotte* is addressed here.[11] Both *Rowe* and *Ayotte* addressed the practices of the same DMCs whose business conduct is the subject of the First Amended Complaint in this case – IMS, Verispan, and others (FAC ¶¶ 14, 15).

Following a detailed and instructive explanation about data mining and its use by pharmaceutical companies (490 F. Supp. 2d at 165-170), *Ayotte* concluded that the statute regulated

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9 N.H. Rev. Stat. Ann. §§ 318:47-f, 318:47-g, and 318-B:12(IV)(2006).

10 Ironically, many passages in that lengthy decision appear almost verbatim in the Complaint filed in this action. The irony arises from the fact that Plaintiff would choose to plagiarize from a decision which establishes that his statutory claims do not survive First Amendment scrutiny.

11 Both cases are currently on appeal to the First Circuit, which heard oral argument in January 2008. *Rowe* is stayed pending that court's decision in *Ayotte* (1st Cir. Case No. 07-1945).

commercial speech. 490 F. Supp. 2d at 175. It therefore analyzed the constitutionality of the statute under the intermediate scrutiny standard established in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980). *Id.* at 177. Under that standard, commercial speech restrictions are enforceable only if they support a substantial governmental interest, directly advance the interest asserted, and are not more extensive than necessary to serve that interest.

The state Attorney General argued that the law was narrowly drawn and directly advanced the state's substantial interests in protecting prescriber privacy, promoting public health, and containing health care costs.[12] IMS took issue with all three contentions and also argued that the law was invalid even if it was effective because its purposes could be achieved as well or better through alternatives that do not restrict speech. *Id.* Agreeing with IMS, the court quoted a Supreme Court comment that "[w]e have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.* at 181, *quoting Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002).

Albertsons may properly invoke the free speech rights of DMCs and pharmaceutical companies in response to this challenge to pharmacy data sales. The Supreme Court has broadened its general rules on standing in First Amendment cases to allow vendors who have suffered their own injuries to assert the rights of their customers, and *vice versa*. *See Craig v. Boren*, 429 U.S. 190, 194-95 (1976); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976)(prescription drug purchasers have standing to challenge state restrictions on drug price advertising by pharmacists). Here, the injury Albertsons will suffer if data sales are prohibited will be (1) its own lost revenue from those sales and (2) any statutory penalties or other damages awarded to Plaintiff and the class.

In sum, as noted above, the CMIA does not apply to the de-identified data here at issue. But even if this Court were to conclude otherwise, it should follow the lead of *Ayotte* and *Rowe* and conclude that the First Amendment precludes application of the CMIA to this form of speech.

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12 Plaintiff's allegations mirror the last two of these claims.

D. All Remaining Causes of Action Are Preempted by Federal Law

In formulating and adopting the Department of Health and Human Services ("HHS") regulations that established and provided for implementation of patient privacy requirements under HIPAA, HHS expressly recognized the crucial importance of de-identified health data to improving our healthcare system:

> There are many instances in which such individually identifiable health information is stripped of the information that could identify individual subjects and is used for analytical, statistical and other related purposes. **Large data sets of de-identified information can be used for innumerable purposes that are vital to improving the efficiency and effectiveness of health care delivery,** such as epidemiological studies, comparisons of cost, quality or specific outcomes across providers or payers . . . . Researchers and others often obtain large data sets with de-identified information from providers and payers (including public payers) to engage in these types of studies. **This information is valuable for public health activities** (e.g., to identify cost-effective interventions for a particular disease) **as well as for commercial purposes** (e.g., to identify areas for marketing new health care services). [65 Fed. Reg. at 59946 (emphasis added).]

When HHS issued the HIPAA Privacy Rule in 2000, it declared that such uses of de-identified health data should be encouraged:

> A number of examples were provided of how valuable such de-identified information would be for various purposes. *We expressed the hope that covered entities [i.e., entities subject to the Privacy Rule], their business partners, and others* ***would make greater use*** *of de-identified health information than they do today* . . . . [65 Fed. Reg. 82462-01, 82543 (December 28, 2000)(emphasis added).]

Consistent with that goal, HHS adopted detailed specifications in the Privacy Rule for de-identifying data. 45 C.F.R. § 164.514(b). De-identified data is not considered to be "individually identifiable health information," 45 C.F.R. § 164.514(a), and the Privacy Rule does not purport to restrict the use of health information unless it is "individually identifiable" – just like the CMIA. 45 C.F.R. §§ 164.502(a), (d).

The Privacy Rule expressly preempts any inconsistent state law unless that law (1) relates to the privacy of individually identifiable health information *and* (2) is more stringent than the federal standards. 45 C.F.R. § 160.203.[13] *None* of Plaintiff's second through ninth causes of action (1)

[13] Section 160.203's prefatory text states that "[a] standard . . . adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law." Its remaining text states the exceptions to that rule of preemption. This reference to "State law" is broad

invokes statutes or common law principles which purport to focus on the privacy of health information, or (2) has anything to do with federal privacy standards, so none is "more stringent than" federal standards. To the extent that Plaintiff would apply them to de-identified data, they are therefore certainly preempted. Any other result would frustrate the federal goal that covered entities and their business associates will "make greater use of de-identified health information than they do today." *See generally* 65 Fed. Reg. 82543. Such greater use of de-identified information directly depends on the absence of state-imposed barriers on HIPAA-compliant de-identified information. Everyone involved in the health care industry, from health care providers to software developers to compliance officers and so on, will be able more efficiently to perform their jobs by focusing on a uniform set of standards for what constitutes de-identified information, rather than having constantly to keep track of an ever-evolving 50-state survey of the topic.

E. The First Amended Complaint Fails to State a Cause of Action for Breach of Contract or the Implied Covenant of Good Faith and Fair Dealing

1. Elements of a Breach of Contract

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) the plaintiff's performance or excuse of nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff." *Hsu v. OZ Optics, Ltd.*, 211 F.R.D. 615, 619 (N.D. Cal. 2002); *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1388 (1990). The First Amended Complaint fails to satisfy even these elementary requirements.

2. Plaintiff Has No Cognizable Damages

The complaint contains only general and conclusory allegations that Plaintiff and the class have been damaged. He newly alleges that his damages include the "significantly impaired value of his proprietary prescription information, the failure to receive compensation for its use by Defendants, and the past and future lost earnings his information would have yielded had he chosen to sell same."[14]

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enough to encompass both Plaintiff's statutory and common law claims. *Cipollone v. Liggett Group*, 505 U.S. 504, 522 (1992).

[14] It is ironic that Plaintiff professes his outrage that Defendants are selling his private information while he simultaneously complains that he would have sold that data himself but for the fact that Defendants have already done so. *Id.* and ¶ 46 ("Plaintiff's ability to sell his property interest

FAC ¶ 28. He also repeatedly claims that his medical information is his "property" (*e.g.*, FAC ¶¶ 9-10 at 4:16-24). However, his individual medical information has *no* value, and he has no property interest in that data. He therefore has no cognizable damages.

Plaintiff cannot assert that he has lost "property" by virtue of Defendants' sales of prescription data. While Plaintiff's doctors might have a property interest in data which reveals their prescribing habits, there is no basis for suggesting that any anonymous patient has such an interest in that data. The few cases which have considered similar questions have refused to recognize a property right in personal information – even though those cases, unlike this one, *did* involve sales of personally identifying information. *Thompson v. Home Depot, Inc.*, 2007 U.S. Dist. LEXIS 68918 at *8 (S.D. Cal. September 18, 2007)(Gonzalez, C.J.)(rejecting plaintiff's claim that his personal information, used by defendant for marketing purposes, is "property"), *citing In re Jetblue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005)("There is . . . no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large"), and *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. 1995)(individual names have "little or no intrinsic value to . . . a merchant"). *Accord: In re Trans Union Corp. Privacy Litigation*, 326 F. Supp. 2d 893, 902-03 (N.D. Ill. 2004)(individual plaintiffs' names have no intrinsic value); *Shibley v. Time, Inc.*, 341 N.E.2d 337, 340 (Ohio App. 1975); *U.S. News & World Report, Inc. v. Avrahami*, No. 95-1318, 1996 Va. Cir. LEXIS 518, at 5 (Va. Cir. June 13, 1996). And *see Moore v. Regents of the University of California*, 51 Cal. 3d 120, 136-39 (1990)(denying plaintiff property rights in his body and his biological information).

In re Jetblue, supra, is noteworthy because there, as here, plaintiffs asserted that they provided their personal information to JetBlue only for the specific purpose of buying an airplane ticket, and that they did so on

> the promise that their personal information would be safeguarded consistent with the terms of [JetBlue's] privacy policy. They had no reason to expect that they would be compensated for the 'value' of their personal information. In addition, there is absolutely no support for the proposition that the personal information of a JetBlue passenger had any value for which that passenger could have expected to be compensated. [379 F. Supp. 2d 299, 327.]

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has been frustrated").

The limited purposes for which the JetBlue plaintiffs provided data offer a striking parallel to the allegations here that Plaintiff provided his data for equally limited purposes. FAC ¶ 10 (data provided only to fill the prescription, process health insurance requirements, and the like). This case also exposes the fallacy in Plaintiff's allegation that his damage consists of the money he could have made from selling his own data but for Defendants' prior sales (FAC ¶ 28). As the court explained, "[i]t strains credulity to believe that, had JetBlue not provided the [personal information] en masse to [a third party], [that third party] would have gone to each individual JetBlue passenger and compensated him or her for access to his or her personal information." 379 F. Supp. 2d at 327.

This case is also analogous to *Dwyer* and *In re Trans Union*, *supra,* both of which involved defendants' sales of data about individual customers which was used to create target marketing lists. *Dwyer,* 652 N.E.2d at 1353; *Trans Union,* 326 F. Supp. 2d at 895. In both cases, plaintiffs asserted privacy claims (among others). In both cases, the courts held that a single customer's name has little or no intrinsic value to the purchasers of such lists, and that value is instead created only when the defendant categorizes and aggregates those names. *Dwyer,* 652 N.E.2d at 1356; *Trans Union,* 326 F. Supp. 2d at 902. The alleged property right asserted by this Plaintiff is even more attenuated, since no one could identify any particular prescription as having been issued to him – unlike the plaintiffs in *Jetblue*, *Dwyer* and *Trans Union*, whose personal information had been disclosed to third parties.

Section 3300 of the Civil Code codifies the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. R. 145 (1854), that contract damages must be reasonably foreseeable and the probable result of the breach of contract. 1 Witkin, *Summary of California Law* (10th ed.), Contracts § 871 at 958. As noted above, Plaintiff's claimed damages consist of the alleged economic value of his personal information. Plaintiffs asserted the same damages in *Jetblue, supra*, but the court rejected that claim because it failed to satisfy the rule in *Hadley v. Baxendale*. That is, that alleged economic loss was not a foreseeable result of breach of the airline's privacy policy, which promised "not to disclose passengers' personal information to third parties." 379 F. Supp. 2d at 325. The law of New York, applied in that case, is the same as California contract law: contract damages are supposed to put plaintiff in the same economic position he would have occupied had the contract been fully performed. *Id.* at 327, and Witkin, *supra,* § 869 at 956.

The parallels between the *Jetblue* passengers' contract claim and that at issue here are striking. The Court should adopt the reasoning of that Court and conclude that Plaintiff has no cognizable damages.

3. Plaintiff Does Not Allege Breach

The express and implied promises allegedly made by Albertsons were not breached by any use or disclosure of Plaintiff's anonymized medical information. Instead, as detailed below, those promises all relate only to the privacy of Plaintiff's individually identifying information. He therefore fails to allege any term which was breached by the conduct at issue.

(a) Albertsons' Privacy Notice Does Not Apply to De-Identified Data.

Plaintiff quotes text allegedly excerpted from various privacy notices published by Albertsons at unspecified times ("Privacy Notice") and then alleges that Albertsons breached those promises of confidentiality (FAC ¶¶ 32, 33 at 14:17-15:25). Even though his quotes are misleadingly selective, each clearly states that it relates only to "personal health information" or "personal information," *not* anonymized information. Plaintiff's original complaint quoted different excerpts from the Privacy Notice, one of which explained that "[w]e are required by federal law to maintain the privacy of health information *that identifies you or that could be used to identify you (known as 'Protected Health Information')*" (Compl. at 13:21-23; emphasis supplied). Plaintiff omits that excerpt from his amended pleading, although it is necessary to define the capitalized phrase "Protected Health Information," which appears in some of the excerpts he now quotes The Notice says nothing whatsoever about the use or disclosure of de-identified information.

In Plaintiff's second cause of action for breach of contract, he quotes again from the Privacy Notice (¶ 58, at 23:1-21) to argue that the Notice creates a contract with him – but again, all references in the quoted text are to "personal information" or "Protected Health Information." Therefore, Plaintiff's breach of contract claim based on the Privacy Notice fails because the Notice does not apply to the sale of anonymized data.

(b) No Other Alleged Promises Concern De-Identified Data.

In addition to the Privacy Notice, Plaintiff relies on other alleged express or implied promises by Albertsons as the basis for his contract claim, including promises that "Albertsons would not use Plaintiff and the Class members' *confidential* medical information for the marketing of drugs," that those individuals' "*individually identifiable* medical information would not be shared, sold, used for marketing, or otherwise used or disclosed," and the like (*id.* ¶ 59). Again, however, none of these alleged promises relates to the use or disclosure of *anonymous* pharmacy data. Plaintiff therefore fails to identify any unilateral promise by Albertsons which was allegedly breached. It also strains credulity to suggest that Albertsons made any promise to *Plaintiff* that it would not sell data about *third parties* (doctors) to others.

Plaintiff's own First Amended Complaint blurs the fact that all personally identifying information is removed before any data is sold to pharmaceutical companies (see, *e.g.*, Paragraphs 9, 12). A more accurate and clearer explanation about the anonymity of this data appears in *Rowe* (532 F. Supp. 2d 153, 162), describing how the data is anonymized at the pharmacy's server even before it is transmitted to the same DMCs whose practices are condemned in Plaintiff's First Amended Complaint: "The information to the [DMCs] is encrypted and the [DMCs] are unable to identify a specific patient. There is no real claim that the [DMCs] have violated an individual patient's right of privacy." The court also explained that

> personal patient information has been and will continue to be encrypted and there is no evidence that the current practices of the [DMCs] and the pharmaceutical companies have had or realistically could have any effect on patient confidentiality. . . . [G]iven the encrypted nature of the patient identifiers and the limited remaining information, such a possibility is extremely farfetched, would involve extraordinary efforts on the part of the [DMC] or pharmaceutical company, and would likely violate a host of federal and state laws. There is no evidence that such an attempt has ever been made and the Court views this contention as purely theoretical. [532 F. Supp. 2d at 173 & n.28.]

Similarly, *Ayotte* recognized that, "to comply with state and federal laws protecting patient privacy, participating pharmacies allow plaintiffs to install software on their computer that encrypts any information identifying patients *before* it is transferred to plaintiffs' [i.e., DMCs'] computers" (emphasis supplied). This process "does not allow the patient's identity to be determined." 490 F. Supp. 2d 163, 166.

4. Breach of Implied Covenant of Good Faith and Fair Dealing

Like many jurisdictions, California recognizes that every contract contains an implied covenant of good faith and fair dealing, obligating the contracting parties to refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. 1 Witkin, *Summary of California Law (10th ed.)*, Contracts § 798, at 892.

But this claim must be founded on a contract. *See Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137, 1153 (1995); *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 631 (1995). Because Plaintiff has failed to adequately plead the existence of an enforceable contract, as a matter of law, Plaintiff also cannot establish a claim for breach of the implied covenant of good faith and fair dealing.

Alternatively, if an enforceable contract is pled, the breach of implied covenant claim is duplicative of the contract claim. It is well settled that, where a plaintiff alleges a contract claim and a covenant claim, both based on the same facts and seeking the same damages, the covenant claim is superfluous and should be dismissed. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 327 (2000) (breach of implied covenant claim duplicative of contract claim properly dismissed as superfluous); *Careau & Co. v. Security Pac. Bus. Credit*, 222 Cal. App. 3d 1371, 1395 (1990) ("If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded and superfluous as no additional claim is actually stated").

F. The First Amended Complaint Fails to State a Cause of Action for "Suppression of Fact"

1. Plaintiff Does Not State A Claim for Fraud

Plaintiff's fourth cause of action is styled "suppression of fact," an alternative label for fraudulent concealment. The threshold question is whether the elements of that cause of action have been pled. Those elements are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 612-13 (1992).

(a) Plaintiff Does Not and Cannot Allege the Requisite Duty

Plaintiff vaguely alleges that he had a special relationship with his pharmacy in order to allege a prima facie claim of fraudulent omission (Compl. ¶ 63), but this purely conclusory statement must be disregarded on this motion. It should instead be intuitively obvious that the data being sold is not the subject of any special duty, even if we assume *arguendo* that Plaintiff has a fiduciary relationship with his pharmacist.[15] That is, no one is selling any information which can be traced to *Plaintiff* (his name, contact information, or other individually identifying information). Instead, what is being sold is data about his doctors: what they are prescribing and with what frequency. In other words, what is sold is *professional* information (about doctors' prescribing practices), not *personal* information (about Plaintiff). How can the sale of data about third parties breach a duty to Plaintiff?

Ayotte recognized that information privacy laws "protect the privacy of personal information," not the professional information contained in the data at issue. *Ayotte,* 490 F. Supp. 2d at 179 n.13. The court also recognized that "health care providers cannot credibly claim that they have a reasonable expectation that their prescribing practices will remain private because prescriber-identifiable data is routinely disclosed to patients, pharmacies, insurance companies, medical review committees, and government agencies. In other words, because health care providers work in a 'closely-regulated' industry, they have at best a diminished expectation of privacy with respect to their prescribing practices." *Id.* (citations omitted). *Rowe* reached the same conclusion. 532 F. Supp. 2d at 164-65 ("[T]o claim a general right to ownership in prescribing patterns is to assert a novel legal protection to information that is widely available at no charge to countless third parties"), and at 170 ("prescribers cannot prevent a host of entities from reviewing their prescribing patterns").

If such professional information is routinely and properly disclosed to "countless third parties," then it must follow that there is no duty to Plaintiff to disclose the future transfer of professional data

15 There is no California appellate decision which holds that the pharmacist-patient relationship gives rise to a fiduciary duty.

about his physicians. Likewise, if doctors are routinely disclosing this data to third parties, it is nonsensical for Plaintiff to claim that his pharmacy must tell him about such data sales, but his doctor need not do so. Plaintiff cannot establish a duty to disclose these data sales to him.

(b) Plaintiff Cannot Establish Cognizable Damages

Deception without resulting loss is not actionable. *Fladeboe v. American Isuzu Motors,* 150 Cal. App. 4th 42, 64 (2007); *Building Permit Consultants v. Mazur*, 122 Cal. App. 4th 1400, 1415 (2004). Prior discussion (at 13-16) has explained that Plaintiff has no cognizable damages, because he has no property interest in his anonymized data and because any person's individual data has no value. He therefore cannot establish damages.

(c) Plaintiff Cannot Establish Causation

As noted above, a *prima facie* claim for fraud must allege that the nondisclosed information was the cause of his damages. All he alleges, though, is that Albertsons failed to disclose that it would be paid for his data and that he would not share in the proceeds (FAC ¶ 76). Since his data in fact had no individual value, any failure to disclose its sale could not have caused him damage.

(d) Plaintiff Fails to Allege Any Material Undisclosed Information

The same prior discussion explained that the representations allegedly made by Albertsons all related only to the use or disclosure of Plaintiff's *confidential* medical information. Plaintiff could well have expected that in return for providing his personal information to Albertsons and paying for his medication, he would obtain the prescribed medicine and his information would be safeguarded consistent with the terms of the privacy policy. He had no reason to expect, though, that he would be compensated for the "value" of his anonymized personal information. See, *e.g.*, *Jetblue*, *supra*, 379 F. Supp. 2d at 327. Any failure to disclose that information could therefore not have been material to his decision to fill his prescriptions at an Albertsons pharmacy.

(e) Plaintiff Fails to Plead Fraud With Specificity

When alleging fraud against a corporation, as here, the particularity requirement is stringent. As the court explained in *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991), "[t]he requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Id.* at 157; *see also In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1410 (9th Cir. 1996) (complaint fails to sufficiently plead fraud because "it provides no specific facts—no names, no meetings, no internal memoranda or documents, no specific conduct or statement—in support of its theory"). Plaintiff's fraud claim fails to satisfy these and other pleading rules and should be dismissed.

G. There is No Reasonable Expectation of Privacy Concerning De-Identified Information and the Breach of Privacy Claim Fails to State a Cause of Action

In his fifth cause of action for breach of privacy, Plaintiff alleges that he had a legally protected privacy interest "as directed by our Supreme Court in *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1" (Compl. ¶ 68). This informational privacy theory requires him to show (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy. *Id.* at 37. "'If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion of privacy may be adjudicated as a matter of law." *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 370 (2007). Based on the facts alleged by Plaintiff, he cannot establish any of the three elements of a privacy claim.

1. Plaintiff Has No Legally Protected Privacy Interest in This Data

The state Attorneys General who defended *Ayotte* and *Rowe* did not even argue that prohibition of de-identified data sales would infringe on *patients'* privacy. *See, e.g., Ayotte*, 490 F. Supp. 2d at 179 ("the Attorney General . . . does not claim that the [prescriber-identifiable data] is used to intrude upon the doctor-patient relationship"). Instead, they argued that the states had a substantial interest in protecting *prescriber* privacy by "limiting unwarranted intrusions into the decision-making process of prescribing physicians" (*id.* at 178). *Ayotte* commented, citing numerous federal cases, that it would "require a substantial extension of existing precedent" to support any argument that the statute protected information privacy – the very claim at issue here. *Id.* at 179 n.13.

As discussed above, information about Plaintiff's individual prescriptions cannot be linked to him. While his anonymized prescriptions do form part of a massive database, no one could tell whether any such prescription was issued to him as opposed to any other pharmacy customer in

California. That data is therefore no more "private" than the information captured by the scanner at his local supermarket which records all products he purchases on a given day, and which likewise cannot be tied to him.

2. Plaintiff Has No Reasonable Expectation of Privacy in the Circumstances

"Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy." *Hill*, 7 Cal. 4th at 36. "[C]ustoms and physical settings of certain activities may impact an individual's reasonable expectation of privacy." *Id.* Since the data at issue is the same data which was at issue in *Rowe* and *Ayotte*, and since both courts (and both state Attorneys General) recognized that this data is "widely available at no charge to countless third parties," Plaintiff cannot claim that he had a reasonable expectation of privacy for that data.

3. There Is No Serious Invasion of Privacy At Issue Here

Furthermore, the fact that the information is de-identified undermines Plaintiff's claim under *Hill*, the case cited in his pleading. As the California Supreme Court explained in that case, an actionable invasion of privacy must be so serious that it constitutes "an egregious breach of the social norms. *Hill*, 7 Cal. 4^{th} at 37.

Aggregating de-identified data regarding Plaintiff with other data about other pharmacy customers and their doctors cannot constitute the "egregious breach of social norms" envisioned by the California Supreme Court in *Hill*. Indeed, courts have repeatedly and resoundingly rejected privacy claims similar to plaintiff's. *See Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1354-56 (Ill. Ct. App. 1995) (credit card company's compiling of lists based on customers' spending habits and selling them to marketing companies did not violate any privacy rights because there was no "unauthorized intrusion;" nor did company "appropriat[e]" plaintiffs' names or personalities); *Shibley v. Time, Inc.*, 341 N.E.2d 337, 339 (Ohio Ct. App. 1975) ("[I]t is constitutionally permissible to sell [magazine] subscription lists to direct mail advertisers . . . [T]he practice complained of here does not constitute an invasion of privacy even if appellants' unsupported assertion that this amounts to the sale of 'personality profiles' is taken as true. . . .").

In addition, the right to information privacy must be balanced against the right to the free flow of information protected by the First Amendment. *See* First Amendment argument, *supra* at 10-12, and *Pioneer Electronics*, 40 Cal. 4th at 371 ("Assuming that a claimant has met the [three] *Hill* criteria for invasion of a privacy interest, that interest must be measured against other competing or countervailing interests in a 'balancing test'"). In this case, since the data transmissions at issue do not tell anyone that Plaintiff has ever taken any particular prescription drug, any alleged intrusion is *de minimis* and cannot counterbalance our society's need to preserve free speech.

H. The First Amended Complaint Fails to State a Cause of Action for Unjust Enrichment

A claim for unjust enrichment is equitable in nature and compels restitution if defendant is enriched *at the expense of another*. *Dinosaur Development, Inc. v. White,* 216 Cal. App. 3d 1310 (1989). "The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." *Id*. For a benefit to be unjust, "it must ordinarily appear that the benefit was conferred by mistake, fraud, coercion or request." *Id*. at 1316, *quoting* 1 Witkin, Summary of Cal. Law (9th ed. 1987), Contracts, § 97 at 126.

Plaintiff alleges that Albertsons profited from its use of Plaintiff's information.[16] For this reason, Plaintiff specifically cites the CMIA as the predicate for this claim (FAC ¶ 87). Since the CMIA does not prohibit Defendants' use of de-identified information, there is no unjust enrichment.

Furthermore, there is no apparent basis for Plaintiff to claim that he (and the class members) "own" this data, and if they do not have such a property interest, then there is no basis for a claim that Defendants profited *at Plaintiff's expense*. If Defendants were selling class members' names, addresses, or other individually identifying information, then Plaintiff might at least claim that this is information which he "owns," although the preceding discussion explains that the courts have declined to recognize such a right (see Contract argument, *supra* at 14-16). But Defendants are *not* selling individually identifying information. Instead, as *Rowe* and *Ayotte* recognized, it is physicians who might more properly advance any unjust enrichment claim, especially in view of the data's use to develop marketing campaigns targeted at them.

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16 Plaintiff also contends that the conduct constitutes a breach of Defendants' fiduciary duties and other duties owing to Plaintiff and members of the Class." (Compl. ¶ 87.) This legal conclusion need not be accepted as true in the absence of *facts* demonstrating how the conduct constitutes a breach of fiduciary duty or "other duties." And see the discussion *supra* at 19-20, which explains why Albertsons had no duty to Plaintiff in these circumstances.

Finally, because his individual data has no value (see discussion *supra* at 14-16), it follows inescapably that Defendants cannot have been "enriched," unjustly or otherwise, by its use.

I. Plaintiff Does Not State A "Trespass to Personalty" Claim

No California case has recognized a cause of action for "trespass to personalty." The seventh cause of action appears to be a claim better known as trespass to chattel. A trespass to chattel occurs when the defendant intentionally interferes with possession of plaintiff's personal property and that interference causes the plaintiff an injury. *Thrifty-Tel, Inc. v Bezenek*, 46 Cal. App. 4th 1559, 1566-7 (1996). California has not extended the tort of interference with chattels to the use of data. This tort protects plaintiffs against "intermeddling" with their personal property. *Id.* at 1566-67. Plaintiff London *has* no personal property right in the anonymized data at issue. Even if he did have such a property interest, he obviously has not been deprived of the use of his personal information at any point, and if indeed he has ever wished to sell it (as he alleges), he has always been free to do so. He therefore cannot state this claim.

Finally, since the courts have refused to recognize a property right in a plaintiff's name (see Contracts discussion *supra* at 14-16), Plaintiff could not make out a trespass claim even if he could allege – which he cannot – that Defendants are selling his name to others.

J. The First Amended Complaint Fails to State a Cause of Action for a Violation of California's Unfair Competition Law

California's Unfair Competition Law ("UCL") prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Plaintiff appears to contend that the data sales at issue violate all three prohibitions.

Before turning to the reasons why Plaintiff does not and cannot allege any of the three types of UCL violations, Albertsons also refers the Court to its argument on the First Amendment (*supra* at 10-12). For the same reasons which prevent application of the CMIA to the data sales at issue, the First Amendment likewise proscribes the application of the UCL to those sales.

1. Plaintiff Cannot Allege Loss of Money or Property

Under the UCL, the only persons authorized to bring claims are those who have "suffered injury in fact and *lost money or property* as a result of [] unfair competition." Cal. Bus. & Prof. Code

§ 17204 (emphasis added); *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America*, 150 Cal. App. 4^{th} 953, 982 (2007); *Thompson v. Home Depot, Inc.*, 2007 U.S. Dist. LEXIS 68918 at *6 (S.D. Cal. September 18, 2007)(Gonzalez, C.J.). Plaintiff cannot establish the loss of either money or property. See Contract argument, *supra* at 14-16.

2. No Allegations of Unlawful Conduct

It is settled law that, in addition to identifying the statutes that constitute the predicates to a Section 17200 claim, a "plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 619 (1993); *see also Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 955 (N.D. Cal. 2003) (requiring allegation of specific facts to state a claim under Section 17200). Here, Plaintiff fails to allege facts sufficient to state the alleged predicate violation of the CMIA for the reasons discussed above.

Plaintiff also points to other laws and regulations, none of which prohibit the alleged conduct any more than the CMIA does. Plaintiff cites the California Constitution, Article I, Section 1, which guarantees individuals the inalienable right to privacy. For the same reason that Plaintiff fails to allege a claim for invasion of privacy under *Hill*, the UCL claim cannot be based on the constitutional right to privacy. Plaintiff also cites a variety of regulations applicable to pharmacy operations. (Compl. ¶ 82(C-E).) Not surprisingly, not one of these relates to de-identified data.

3. No Allegations of Unfair Conduct

In order to prove that conduct is unfair, a plaintiff must allege that the conduct threatens a violation or offends the spirit of some law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 186-87 (1999); *see also Watson Laboratories, Inc. v. Rhône-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1117 (C.D. Cal. 2001). Plaintiff first attempts to satisfy this standard by alleging that Defendants' conduct constitutes violations of federal and state law. For the reasons discussed above, there are no violations of any such law.

Apart from the statutory claim, in order to properly state a claim under the "unfair" prong of the UCL, Plaintiff must allege conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th at 187 (1999); *Watson Laboratories*, 178 F. Supp. 2d at 1117. There are no allegations of a violation of any antitrust law or comparable conduct.

4. No Allegations of Fraudulent Conduct

The case law on this element of section 17200 is still evolving, and does not provide clear guidance on the elements of a prima face claim for "fraudulent" conduct under that statute. Cases brought by plaintiffs acting in a representative capacity, seeking to remedy conduct which defrauds consumers, need not allege fraud with the specificity required in common law fraud actions. Instead, such a plaintiff states a claim for "fraudulent" conduct under section 17200 if members of the public are likely to be deceived. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992). Even under this relaxed pleading standard for fraud, Plaintiff fails to allege such deception and therefore does not state a claim for "fraudulent" unfair competition.

It is proper for a court to determine on a motion to dismiss whether a plaintiff has stated facts sufficient to show that the public is likely to be deceived by the defendant's purportedly "fraudulent" conduct. *See Haskell v. Time, Inc.*, 857 F. Supp. 1392 (E.D. Cal. 1994) (granting motion to dismiss on the ground that reasonable consumers could not be deceived by alleged false advertising); *See also Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1159-60 (2000) (demurrer to section 17200 "fraudulent" conduct claim properly sustained where allegations were insufficient to support the theory that the public was likely to be deceived).

As Albertsons explained in the CMIA discussion (*supra* at 5-11), HIPAA and the CMIA both expressly permit the disclosure of de-identified medical data to third parties, which confirms that no likelihood of deception is present here. And since the data Albertsons is selling is about doctors, not any individual pharmacy customer, Plaintiff lacks standing to complain that these data sales mislead doctors, much less the broader "public." Most importantly, there is not and cannot be any allegation that any of the data at issue is false or misleading, so there is no basis for any claim of deception.

K. The First Amended Complaint Fails to State a Cause of Action for a Violation of California's Consumer Legal Remedies Act

While the motion to dismiss the original Complaint was pending, Plaintiff filed a First

Amended Complaint alleging for the first time a claim under CLRA. The CLRA claim is both procedurally and substantively deficient. In addition, as noted earlier, this statutory claim is preempted by the Privacy Rule and cannot withstand First Amendment challenge.

1. Plaintiff Failed to Provide Statutory Notice for a CLRA Claim

Under Cal. Civ. Code Section 1782(a), a consumer must give notice at least thirty days before commencing an action seeking damages for a violation of the CLRA. He may bring an action for injunctive relief without giving notice, but if he later decides to amend and seek damages, notice must be provided before adding the damages request. Cal. Civ. Code § 1782(d). Deficiencies relating to a CLRA notice are appropriately raised in a Rule 12(b)(6) motion. *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 949-50 (S.D. Cal. 2007). "The CLRA's notice requirement is not jurisdictional, but compliance with this requirement is necessary to state a claim." *Cattie*, 504 F. Supp. 2d at 949, *citing Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40-41 (1975) (addressing failure to give notice under demurrer standard); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194, 1195-96 (S.D. Cal. 2005) (dismissing CLRA damages claim with prejudice under Rule 12(b)(6) for failing to comply with notice requirements) and *Von Grabe v. Sprint*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003) (dismissing premature claims for damages *with prejudice*).

Here, Plaintiff incorrectly states that he has provided a CLRA notice. (FAC ¶ 104.) This is apparently a reference to a May 16, 2008 letter from Jeffrey Krinsk (Plaintiff's counsel) to Albertsons' counsel enclosing a draft of the original complaint in this case. Lowe Decl. ¶ 8 and Exh. E. That letter fails to meet the requirements of Section 1782 in at least the following respects. First, it does not identify the particular violation at issue. Cal. Civ. Code §§ 1770, 1782(a)(1). Second, the letter does not demand that Albertsons correct those alleged violations. Cal. Civ. Code § 1782(a)(2). Third, the letter was not sent by certified or registered mail. Cal. Civ. Code § 1782(a)(2). Fourth, the draft Complaint sought only injunctive relief and promised to give notice in compliance with the statute if an amended pleading was to be filed.[17] No such notice has subsequently been received. There can be no question that neither the May 16, 2008 letter nor the draft Complaint constitutes the notice specified in the CLRA. Failure to satisfy those notice requirements requires dismissal of the CLRA claim *with prejudice*. *Von Grabe*, 312 F.Supp.2d at 1304.

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[17] The draft Complaint enclosed with the May 16, 2008 letter stated that "at the present time (and without prejudice to Plaintiff London's right to further amendment), pursuant to § 1782(d) of the CLRA, Plaintiff only seeks an order enjoining the above-described wrongful acts and practices of Defendants, plus costs

2. Plaintiff Fails to State a Viable CLRA Claim

Even if the Court does not dismiss the CLRA claim based on lack of statutory notice, it should dismiss for the alternative reason that Plaintiff does not state a claim for relief under any of the four CLRA subsections on which he relies:

> (4) Using deceptive representations or designations of **geographic origin** in connection with goods or services.
> (5) Representing that **goods or services** have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.
> (9) Advertising **goods or services** with **intent not to sell** them as advertised.
> (14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

Cal. Civ. Code § 1770(a)(4), (5), (9) and (14). The inclusion of Subdivision 4 is puzzling as this case has nothing to do with designations of geographic origin. "To state a claim under section 1770, subdivision (a)(4), therefore a plaintiff must allege facts that show the deception relates to geographic origin." *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 807 (2006).

Subdivision 5 is inapplicable because there are no goods or services at issue here, only Albertsons' conduct with respect to de-identified information. The Northern District, following a California decision, has recently held that credit card accounts are not "goods or services" subject to that statute. *In re Late Fee and Over-Limit Fee Litigation*, 528 F. Supp. 2d 953, 966 (N.D. Cal. 2007) *citing Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229 (2007). "The extension of credit is not a tangible chattel. True, a plastic credit card is tangible. But the card has no intrinsic value and exists only as indicia of the credit extended to the card holder." *Id*. When the claim is predicated on

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and attorneys' fees, and any other relief which the Court deems proper." (FAC ¶ 85.) "Plaintiff London will separately notify Defendants New Albertson's and Cerberus by certified mail, return receipt requested, of the particular violations of § 1770 and the CLRA and demand that Defendants remedy the actions described above and give notice to all similarly affected California consumers of intention to do so." (FAC ¶ 85.)

something that is not goods or services, even if goods or services were also provided, the claim fails. For example, in *Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.*, 436 F. Supp. 2d 1095, 1109 (C.D. Cal. 2006), the Central District rejected the contention that annuities constitute a good or service. This was true even though defendants also provided services (financial planning). "To the extent plaintiffs' CLRA claim is predicated on defendants' sale of annuities – as distinct from their providing estate or financial planning – such a claim cannot lie." *Id.* Similarly, the claim here relates to the handling of medical information, which does not constitute "goods or services" within the meaning of the statute. While Albertsons provided a service (filling a prescription) and sold goods (drugs), the de-identified data that is at issue here is neither goods nor services. Subdivision 5 does not apply.

Plaintiff's reliance on Subdivision 9 is equally frivolous as that provision is also limited to "goods or services." Moreover, Plaintiff cannot in good faith claim that, to the extent any goods or services are at issue in this lawsuit, they were sold "with **intent not to sell** them as advertised." Cal. Civ. Code § 1770(a)(9).

Finally, Plaintiff alleges that Albertsons' practices with respect to the de-identified information violate Subdivision 14, which prohibits making a representation "that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Cal. Civ. Code § 1770(a)(14). For the same reason that the breach of contract and implied covenant claims fail, as discussed above, this theory also fails. The promises allegedly made by Albertsons' Privacy Notice, which form the unilateral contract or "transaction" (as the term is used in the statute), involve only protected health information and not de-identified information. Albertsons has made no representations concerning de-identified information. Accordingly, this claim fails as well.

L. Plaintiff Lacks Standing to Sue

"The well established rule of third-party standing is that in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." 15 Moore's Federal Practice (3d ed. 2008), § 101.51[3][a]. This requirement assures that federal courts refrain from deciding abstract issues of public importance, prevents them from adjudicating rights whose holders may not wish to assert them, and recognizes that the holders of rights are likely to be the most effective advocates. *Id.* at 101-88.6 – 101:90. To establish such standing, the third party must be unable to protect its own interest. *Id.*, § 101.51[3][c][iii] at 101-94.

Plaintiff is in fact a third party to the interests at issue, since it is information about his doctors, not information which can be linked to him individually, which Defendants sell to DMCs. That is, according to the First Amended Complaint, the data which DMCs sell has value to pharmaceutical companies only because it aggregates the prescription histories of many anonymous patients to reveal the prescribing practices of individual doctors. Information about any particular individual has no value to those companies because it cannot help identify any doctor's overall prescribing habits. Only when all the prescription data generated by one doctor to one patient is later aggregated with prescription data generated by the same doctor for other patients and filled at the same or other pharmacies will the doctor's overall practices be revealed. If anyone has first party standing to complain about these data sales to pharmaceutical companies, then, it is the physicians whose prescribing practices are revealed by that data and who are then targeted in individually tailored marketing pitches.

Stated differently, the data is not "about" Plaintiff, because no one could discern from reviewing that data that any individual prescription was issued to him rather than to some other individual. Plaintiff therefore cannot realistically contend that it was "his" data which Albertsons has sold. He is a third party to the interests being asserted, and he cannot seriously claim that physicians are unable to protect their own interests. He cannot assert third party standing.

CONCLUSION

For the foregoing reasons, the Albertsons respectfully request that this Court dismiss the First Amended Complaint in this action with prejudice and grant such further relief as the Court in its discretion may deem just and proper.

Dated: August 5, 2008

DORSEY & WHITNEY LLP

By: *s/ Kent J. Schmidt*
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	CASE NO.: 08-1173 HC AB Assigned to: Hon. Marilyn Huff **DECLARATION OF KATHLENE W. LOWE IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** **SPECIAL BRIEFING SCHEDULE ORDERED [CivLR 7.1 E(8)]** **Hearing:** Date: September 29, 2008 Time: 10:30 a.m. Courtroom: 13, Fifth Floor Complaint filed: May 29, 2008 First Amended Complaint filed: July 28, 2008

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I, KATHLENE W. LOWE, declare:

1. I am a Partner with the law firm of Dorsey & Whitney LLP, counsel of record for Defendant New Albertson's, Inc. ("Albertsons") in this action. I have personal knowledge of the following or knowledge based upon relevant business records and information and if called as a witness, could competently testify thereto.

2. Attached as **Exhibit A** is a true and correct copy of the legislative history of Assembly Bill 262 ("AB 262"), which I obtained from the Legislative Intent Service. Among other things, the Bill History states that the AB 262 "Died in Conference" on November 30, 2004.

3. Attached as **Exhibit B** is a true and correct copy of a report of the California Senate Committee on Business and Professions, showing a hearing date of August 19, 2003, regarding AB 262. At page 2 of the report, the authors note that this bill "[p]rohibits a person from transmitting, selling, or releasing to a third party, in exchange for remuneration, any prescribing data of a physician, if the physician has placed his or her name on a DO NOT USE list maintained by the Board on its Web-site . . . ."

4. At page 4 of Exhibit B, the authors comment (at Point 1) that AB 262 contained "two major parts, one sponsored by the Office of HIPAA Implementation . . . relating to CMIA and medical marketing, and the other sponsored by the California Medication Association (CMA) relating to the sale of physician prescribing data."

5. At page 9 of Exhibit B, the authors comment that "[i]t seems clear that the CMIA was intended to apply to patient medical information and not physician prescription information which may or may not be made available to other persons or entities depending on the specified restrictions with Section 56.268."

6. Attached as **Exhibit C** is a true and correct copy of a report by the California Senate Rules Committee on Assembly Bill 715 ("AB715"). It explains, at pages 1-2, that AB 715 contains the portion of AB 262 which related to the CMIA and medical marketing (i.e., one of the two portions of AB 262 discussed at Paragraph 4 above). On page 3, it notes that AB 262 contained provisions relating both to medical marketing and to physicians' proposed DO NOT USE list.

7. The legislative history comments following the text of Civil Code Section 56.10(d) in West's Annotated California Codes confirm that the amendment which added the "use for marketing" prohibition to the CMIA in 2004 was contained in AB 715. For the convenience of the Court and all counsel, a copy of that page is attached as **Exhibit D.**

8. Attached hereto as **Exhibit E** is a true and correct copy of a letter that I received from Jeffrey Krinsk, counsel for Plaintiff in this action, and its enclosed draft Complaint. The letter is dated May 16, 2008 and was received sometime after that date. To my knowledge, neither my office nor Albertsons has received any other communication from Plaintiff or his counsel which purports to comply with the requirements of Cal. Civ. Code Section 1782(a).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 14, 2008, in Irvine, California.

KATHLENE W. LOWE

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EXHIBIT A

History of AB 262 (2003)

http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0251-0300/ab_262_bill_20041130_history.html

COMPLETE BILL HISTORY

BILL NUMBER : A.B. No. 262
AUTHOR : Chan
TOPIC : Pharmacies: physician prescribing data.

TYPE OF BILL :
Inactive
Non-Urgency
Appropriations
Majority Vote Required
State-Mandated Local Program
Fiscal
Non-Tax Levy

BILL HISTORY
2004
Nov. 30 Died in Conference.
Aug. 28 Assembly refused to concur in Senate amendments. To Conference Committee. (Ayes 37. Noes 34. Page 8068.)
Aug. 27 Joint Rule 62(a), file notice suspended. (Page 7971.) From committee: With recommendation: That Senate amendments be concurred in. (Ayes 10. Noes 3.) (August 27).
Aug. 26 Assembly Rule 77 suspended. (Page 7802.) Re-referred to Com. on HEALTH. pursuant to Assembly Rule 77.2.
Aug. 25 In Assembly. Concurrence in Senate amendments pending. May be considered on or after August 27 pursuant to Assembly Rule 77.
Aug. 25 Read third time, passed, and to Assembly. (Ayes 22. Noes 15. Page 5330.)
Aug. 23 Read third time, amended, and returned to third reading.
Aug. 17 Read second time, amended, and to third reading.
Aug. 16 From committee: Amend, and do pass as amended. (Ayes 7. Noes 4.).
Aug. 4 In committee: Placed on Appropriations suspense file.
July 29 In committee: Hearing postponed by committee.
July 7 Read second time, amended, and re-referred to Com. on APPR.
July 6 From committee: Amend, do pass as amended, and re-refer to Com. on APPR. (Ayes 5. Noes 2.).
June 30 Joint Rule 62(a), file notice suspended. (Page 4494.)
June 29 In committee: Set first hearing. Failed passage. Reconsideration granted.
June 23 Re-referred to Com. on JUD.
June 22 From committee: Do pass, and re-refer to Com. on RLS. Re-referred. (Ayes 6. Noes 0.).
June 21 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on B. & P.
June 9 Re-referred to Com. on B. & P.
June 7 Withdrawn from committee. Re-referred to Com. on RLS.
June 3 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on APPR.

Jan. 6 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on APPR.
2003
Aug. 28 In committee: Hearing postponed by committee.
Aug. 27 Joint Rule 62(a), file notice waived. (Page 2158.)
Aug. 26 Withdrawn from committee. Re-referred to Com. on RLS. Re-referred to Com. on APPR.
Aug. 25 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on B. & P.
Aug. 18 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on B. & P.
July 24 Re-referred to Com. on B. & P.
July 22 Read second time, amended, and re-referred to Com. on RLS.
July 21 From committee: Amend, do pass as amended, and re-refer to Com. on RLS. (Ayes 5. Noes 1.).
July 10 Joint Rule 61(a)(9) suspended. (Page 1731.)
July 8 From committee chair, with author's amendments: Amend, and re-refer to committee. Read second time, amended, and re-referred to Com. on JUD.
May 29 Referred to Com. on JUD.
May 20 In Senate. Read first time. To Com. on RLS. for assignment.
May 19 Read third time, passed, and to Senate. (Ayes 76. Noes 0. Page 1751.)
May 12 Read second time. To third reading.
May 8 From committee: Do pass. (Ayes 24. Noes 0.) (May 7).
Apr. 30 Re-referred to Com. on APPR.
Apr. 29 Read second time and amended.
Apr. 28 From committee: Amend, do pass as amended, and re-refer to Com. on APPR. (Ayes 22. Noes 1.) (April 22).
Mar. 27 Re-referred to Com. on HEALTH.
Mar. 26 Read second time and amended.
Mar. 25 From committee: Amend, do pass as amended, and re-refer to Com. on HEALTH. (Ayes 13. Noes 0.) (March 18).
Mar. 13 Re-referred to Com. on JUD.
Mar. 12 From committee chair, with author's amendments: Amend, and re-refer to Com. on JUD. Read second time and amended.
Feb. 24 Re-referred to Com. on JUD. by unanimous consent, and then be re-referred to Com. on HEALTH.
Feb. 11 Referred to Coms. on HEALTH and JUD.
Feb. 5 From printer. May be heard in committee March 7.
Feb. 4 Read first time. To print.

EXHIBIT B

Hearing Date: August 19, 2003 Bill No: AB 262

SENATE COMMITTEE ON BUSINESS AND PROFESSIONS
Senator Liz Figueroa, Chair

Bill No: AB 262 Author: Chan
As Amended: August 18, 2003 Fiscal: Yes

SUBJECT: Personal information.

SUMMARY: This bill prohibits health care providers and plans from receiving payment from third parties to send marketing materials to their patients, except in certain limited circumstances, and prevents any person from selling or releasing physician prescribing data to a third party if his or her name is on a "DO NOT USE" list maintained by the Medical Board, unless for specified purposes.

Existing federal law, the federal Health Insurance Portability and Accountability Act (HIPAA):

1) Provides that a health care provider or plan may not market to a patient without prior authorization.

2) Exempts the following practices from the definition of "marketing":

   a) communications made to describe a health-related product or service that is provided by, or included in a plan of benefits of the provider, or

   b) communications made for the treatment of the individual, or

   c) communications made for case management or care coordination, or the recommended alternative treatments to an individual.

Existing state law, the Confidentiality of Medical Information Act (CMIA):

1) Provides that no health care provider or plan shall intentionally share, sell, or otherwise use medical information for any purpose except as authorized in law or where the patient has consented.

2) Provides that medical information may be disclosed to a third party for purposes of "disease management programs," which are defined as services administered to patients in order to improve their overall health utilizing cost-effective, evidence-based, or consensus-based practice guidelines and patient self-management strategies.

3) Defines "prescription" as an oral, written, or electronic transmission order given individually for the person or persons for whom ordered that includes specified information including the name of the patient, the name and quantity

of the drug prescribed and directions for use, and the conditions for which the drug was prescribed if requested by the patient.

4) Allows the issuance of a prescription by a licensed physician, dentist, optometrist, podiatrist, certified nurse-midwife, nurse practitioner, or physician assistant if so authorized.

5) Requires all prescriptions filled by a pharmacy to be maintained on the premises and available for inspection by authorized officers of the law.

6) Provides that it shall be unprofessional conduct for a pharmacist to violate any provisions of law governing pharmacy.

7) Provides for the licensing and regulation of physicians and surgeons by the Medical Board (Board).

This bill:

1) Defines "marketing" as making a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.

2) Excludes from the definition of "marketing" the following:

a) communications for which the communicator does not receive direct or indirect remuneration;

b) certain communications made to a current enrollee of a provider network or health plan regarding how the plan works and can be utilized;

c) communications by a provider that are tailored to the circumstances of a particular individual for treatment purposes;

d) communications by a provider or plan in the course of managing the treatment of the individual, or for the purpose of recommending alternative treatments to the individual, so long as the communicator is not receiving remuneration for the communication; and,

e) communications for disease management programs for a seriously debilitating or life-threatening condition where the provider or plan receives remuneration, however, requires the communicator to inform the individual that the communication is paid for by a third party and to provide the individual with an "opt out" for these types of communications.

3) Prohibits a person from transmitting, selling, or releasing to a third party, in exchange for remuneration, any prescribing data of a physician, if the physician has placed his or her name on a DO NOT USE list maintained by the Board on its Web-site, and allows the Board to contract with a third party to create or maintain the list.

4) Defines "prescribing data of a physician" as information that sets forth a prescription written by a physician in combination with any item that individually identifies the physician, including a unique identifier assigned for tracing purposes.

5) Allows the Board to impose a reasonable fee upon a physician for the listing of the physician's name on the DO NOT USE list and upon a person for the right to access the information contained on the list.

6) Requires a person transmitting, selling, or releasing any prescribing data as permitted to update its data biannually to ensure that it conforms to the DO NOT USE list.

7) Specifies that a person transmitting, selling, or releasing any prescribing data does not violate the prohibition against providing prescribing data if the physicians name was not on the list when the person initially consulted the list and less than six months have passed since the initial consultation, and if the person performed a biannual update and less than six months have passed since the update was performed.

8) Permits the prescribing data of a physician whose name is on the DO NOT USE list to be transmitted, sold, or released to any third party, in exchange for remuneration, as reasonably necessary, for any of the following purposes:

a) For use in aggregate form if it is not associated with any personal identification of a physician or any unique identifier established for the purpose of tracking an individual physician.

b) To provide the physician with information about a specific drug, which is not included in the package insert approved by the federal Food and Drug Administration (FDA) for the drug, that is essential to the safe use of the product, such as information regarding side effects, contraindications, interactions, and dosing. Promotional material may not, under any circumstances, be provided in combination with this information.

c) To provide the physician with information regarding action by the state or be the FDA limiting or disallowing the sale or use of a specific drug or to voluntarily disclose to the FDA adverse events related to a specific drug or medical device.

d) Use by a licensed health care professional directly related to providing health care to a patient or by a health insurer or health care service plan or its contractor directly related to administering the health care benefit, or for use by programs and procedures related to the treatment of chronic and seriously debilitating or life-threatening conditions, as defined.

e) Research projects or clinical trials for which a physician has expressly authorized the specific release of prescribing data.

FISCAL EFFECT: According to the Assembly Committee on Appropriations Committee analysis, dated May 7, 2003, minor absorbable costs to the Department of Justice. However, recent amendments requiring the Board to maintain a DO NOT USE list, or for the Board to contract with a third party to create or maintain the list, may have costs and staff resources associated with those requirements and the Board would need authorization for those expenditures.

COMMENTS:

1. **Purpose.** This bill contains two major parts, one sponsored by the Office of HIPAA Implementation under the California Health and Human Services Agency relating to CMIA and medical marketing, and the other sponsored by the California Medical Association (CMA) relating to the sale of physician prescribing data.

   a) **CMIA provisions.** The author indicates that California has one of the most complete and comprehensive privacy laws regulating the use of personal health information. Although CMIA limits use of personal health information to the provision of health care services for the patient, it does not specifically define health care services, nor does it address the use of personal health information for marketing-type activities, which leaves the law open for broad interpretation. As argued by the author, current federal regulations and State law thus create a loophole that will allow the use of personal health information for marketing-type activities without control or opt out opportunities for the individual.

   b) **Physician prescribing data provisions.** CMA indicates that currently drug companies pay millions of dollars to purchase from pharmacies the names of doctors and the drugs they have prescribed and then develop a prescribing "profile" of individual physicians, send unsolicited product information and lobby them to change which drugs they prescribe. This practice is an international phenomenon that has prompted Canada and Europe to examine and implement restricted access to this information. According to CMA, with more than 7 million prescriptions filled every month in California, purchasing prescription information is a multi-million dollar industry, and a factor in rising costs of prescription drugs. This measure will combat the sale of physicians' prescribing decisions by establishing a DO NOT USE list similar to the "Do Not Call" list used to restrict telemarketing. Pharmacies would be prevented from selling the prescribing information of any physician who puts their name on the list, unless certain exceptions apply.

2. **Background.**

   a) **Clarification of CMIA with the Federal HIPAA.** The HIPAA was signed into law on August 21, 1996 (PL 104-191). While the primary intent of HIPAA was to improve health insurance accountability for persons changing employers or leaving the workforce entirely, the law also contained administrative simplification provisions that aimed to reduce the administrative burden associated with the transfer of health information between organizations. Under HIPAA, the Secretary of the United State Department of Health and Human Services (HHS) is required to adopt standards for, among other things, privacy of personal health information.

On August 14, 2000, pursuant to this requirement, HHS published its "Standards for Privacy of Individually Identifiable Health Information: Final Rule" (Standards). Under the Standards, in most cases, a health care provider or health plan must first obtain an authorization from the patient for any use of disclosure of protected health information for marketing. However, the definition of marketing was recently amended and threatens to create confusion between HIPAA and CMIA. This bill is intended to address the potential confusion and ensure that California law is clear with respect to the issue of the marketing of medical information.

Under the Standards, marketing information is defined to include situations where a health care provider or health plan discloses protected health information to another entity in exchange for direct or indirect remuneration so that the other entity can make a communication about its own product or services to the patients of the provider or plan. The author points out that in some cases, information is not disclosed to the third party, yet marketing still occurs. For example, the author provided a recent letter sent by Rite Aid to a patient in which the company extolled the virtues of Allegra and encouraged the patient to refill his/her prescription for the drug. The letter notes that the mailing is funded by Aventis Pharmaceuticals and "neither your name or your doctor's name will be given to Aventis Pharmaceuticals." In this case, Rite Aid never disclosed any information to Aventis, yet the pharmacy received remuneration from the pharmaceutical company for the communication.

b) **This measure has been double referred from the Senate Judiciary Committee.** This measure was heard by the Senate Judiciary Committee on July 15, 2003. All issues regarding changes and amendments to the CMIA and marketing of medical information were addressed at that time. However, on July 8, 2003, the bill was amended to include for the first time the provisions sponsored by CMA relating to the sale of physician prescribing data. The language was included in the Business and Professions Code dealing with Pharmacy Law and would have made it unlawful to directly or indirectly sell, or otherwise transfer to any person not directly involved in filling a prescription, any information or data related to a prescription filled by a pharmacy or licensed pharmacist if it contained any identifiable information of the prescribing physician. It required the Board of Pharmacy to take action against the pharmacy or pharmacist who violated this provision.

As indicated by the Judiciary Committee, at issue with this amendment was whether the sale or transfer of physicians' prescribing practices by pharmacists and pharmacies should be regulated. As explained by the Committee, the data, while not individually identifiable to the patient, is aggregated by health research companies and sold to pharmaceutical companies, and used for market studies and targeted marketing efforts. In many cases, pharmaceutical companies will know more than a physician about his prescribing practices, and physicians object that the information violates their professional privacy. In addition, while the practice has no direct impact on consumers and patients, physicians argue that it increases health care costs.

There was strenuous opposition to this amendment by the pharmaceutical companies and companies that aggregate and sell prescription drug data. In discussions with the opponents, the author agreed in concept to a different approach involving an "opt-out" list for physicians. The Committee agreed to allow the bill to move forward but reserved the right to call the bill back to Committee regardless of whether a rule waiver would be needed to prevent the bill from becoming a two-year bill.

This bill was amended once again on July 22, 2003, after being heard by the Judiciary Committee. The language originally placed in the Business and Profession Code pertaining to physician prescribing information was removed, but similar language was placed in the CMIA. This bill was referred to the Senate Business and Professions Committee on July 24, 2003.

On Wednesday, August 13, 2003, the Senate Business and Professions Committee received proposed amendments to this measure regarding the creation of a DO NOT USE list to prevent the sale, transmittal or release of prescribing date of a physician. These amendments are reflected in the August 18, 2003 version of the bill.

c) **The American Medical Association (AMA) has a physician privacy policy.** Physicians who chose not to receive information on the products and/or services offered by pharmaceutical companies may specify this preference as part of the AMA's Do Not Release or Do Not Contact policy. If the physician requests this status, the AMA will prohibit the release of physician identifying information to all entities and their direct affiliates. The Do Not Release policy prohibits the AMA from releasing any information it has on the physician, while the Do Not Contact policy is less stringent and ensures that the physician's name will not be given for marketing purposes. Although the physician will receive health hazard warnings, drug recalls, and AMA related information, their identifying information will not be provided for purposes of distributing drug samples, journals or other promotional materials. However, a pharmaceutical representative may still contact the physician by using information from a source outside of the AMA.

3. **Most Pharmaceutical Companies and Health Research Companies are "Opposed Unless Amended."** IMS Health Incorporated, which is one of the leading providers of information, research, and analysis to the health care industry, is opposed to the creation of a DO NOT USE list and restrictions on use of prescription information proposed by CMA , for the following reasons: (1) these restrictions will have a disparate impact on many different parties in the health care system, with certain organizations benefiting from the

amendment and many organizations adversely impacted by the amendment; (2) it will result in significant financial and economic costs to the health care system at a time when costs are already high; (3) the quality of health care research available to industry, government and academia will be severely, adversely affected; (4) efforts to provide information to physicians that's relevant to their practice will become less efficient, leading to more visits, telephone calls and materials to physicians to ensure important information reaches these physicians; and, (5) there is no evidence that existing guidelines sponsored by the AMA do not work.

Arclight Systems, which is an independent information services company that provides data on, among other things, pharmaceutical product volume and market share, is opposed to the CMA language and makes the following arguments: (1) the restrictions will substantially increase the costs to collect physician prescribing information which has many beneficial uses and adversely impact the quality of information services available to customers; (2) it will force pharmaceutical companies to shift resources into more expensive, less efficient broader-based marketing and advertising programs and will impede generic manufacturers' ability to market generic drugs effectively, which would lead to higher costs for consumers; (3) a new privacy right for physicians in their professional (not personal) capacity is inconsistent with state and Federal court decisions and the HIPAA Privacy Standard; and, (4) disclosure of physician prescription information is protected commercial speech under the First Amendment.

The California Healthcare Institute argues that provisions restricting prescriber data would disrupt established practices utilized by drug manufacturers, physician organizations and medical plans by hindering distribution of free sample medicine to physicians (and ultimately patients), impede placement of clinical trials and prejudice public health studies.

Pharmaceutical companies such as GlaxoSmithKline, Johnson & Johnson, Bristol-Myers Squibb Company, and Cephalon, Inc. argue that CMA complains, with minimal substantiation, that California physicians are confronted by pharmaceutical sales representatives with more precise information regarding physician prescribing practices than is maintained by physicians themselves, and that the information is used in product promotions efforts to which physicians object. As argued by the companies, the obvious solution is for an offended physician simply to advise a sales representative, or their company, to no longer communicate their knowledge of the physician's prescribing practices during a product presentation. The legislation should focus on complaints regarding these practices, not on the status of the prescribing information to accord it "property" status in control of the physician. These amendments will create an unnecessarily elaborate physician "opt-out" process that envisions registration by physicians with the Board to prevent contacts.

4. **Other Policy Issues of Concern.**

a) **Should the Medical Board assume the responsibility for maintaining the DO NOT USE list?** Currently, the Board is required to reduce its budget for Fiscal Year 2003-04 by $1.8 million. The Board has also experienced in the last 13 months, the elimination of 38.5 positions, 13% of its workforce. The Board is currently struggling to maintain its service levels in the face of a growing caseload and has sought additional positions to meet workload and increased responsibilities for new mandates.

Although the Board does not have an official position on the bill, they do have a policy position regarding no new unfunded mandates, especially in light of the major reductions in staffing. It is likely the Board would pursue contracting out both the creation and maintenance of the DO NOT USE list, but it would still cost time and staff resources to process and oversee a contract and in order to pay for the contractor the Board would need authorization to spend the funds. The Board has indicated that language should be added to this measure to read as follows:

"This section shall become operative within 190 days following the appropriation of $120,000 to the Medical Board of California's operating budget for the development or contracting out of the automated systems necessary to effectively maintain and disseminate information contained in the "DO NOT USE" list described in this section."

Also indicated by the Board, that if the language does not give authority to the Board to impose a reasonable fee for use of the listing, then they would have to hold a regulatory hearing to set the fee. The Board suggests that the following language also be included:

"The medical board, by regulation, may impose a reasonable fee."

b) **It is unclear how the prohibition against providing prescribing information of a physician would be enforced.** There are two sections in the Civil Code regarding violations of specific provisions of the CMIA. Section 56.35 provides that a patient whose medical information has been used or disclosed in violation of specified sections of the CMIA and who has sustained economic loss or personal injury may recover compensatory damages, punitive damages not to exceed $3,000, attorneys' fees not to exceed $1,000, and litigation costs. Section 56.36 provides that any violation of the provisions of the CMIA that results in economic loss or personal injury to a patient is punishable as a misdemeanor. In addition, any individual may bring an action against any person or entity who has negligently releases confidential information or records concerning a patient, and any person or entity who negligently discloses "medical information" in violation of the CMIA shall be subject to a fine not to exceed $2,500 per violation, and if intentionally discloses "medical information" a fine not to exceed $25,000 per violation. Any person or entity that intentionally uses the medical information for financial gain shall be liable for a fine not to exceed $250,000 per violation.

"Medical information" as defined in the CMIA means any individually identifiable information, in electronic or physician form, in possession of or derived from a provider or health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment.

"Prescribing data of a physician" has been separately defined in the new Section 56.268 of the bill which requires the DO NOT USE list to be maintained. It does not appear as if any of the specified damages or civil remedies and fines of the CMIA would apply to those who may violate Section 56.268, since the definition of "medical information" does not seem to include the physicians prescribing information. Also it should be noted that the restrictions of Section 56.268 would generally apply to pharmacists and pharmacies that currently supply prescribing information. The Board of Pharmacy may take action against a pharmacist for unprofessional conduct if they violate any state law governing pharmacy. It is not clear that violation of the restrictions regarding the sale or release of prescription information of a physician who is on a DO NOT USE list would amount to unprofessional conduct of the pharmacist unless specified as such.

If violations regarding Section 56.268 are to be specified, then the author should consider creating a separate part in the Civil Code rather than under the CMIA, such as "PART 2.65" and renumber the section to "Section 57." It seems clear that the CMIA was intended to apply to patient medical information and not physician prescription information which may or may not be made available to other persons or entities depending on the specified restrictions within Section 56.268.

5. **Similar Legislation This Session.** AB 103 (Reyes) would require a pharmaceutical manufacturing company to annually disclose to the Board of Pharmacy certain information regarding the economic benefits the company provides in connection with its marketing activities, including disclosing the names of the recipients of any benefits and the value, nature, and purpose of the benefits. The bill failed passage on the Assembly Floor and is currently on the Assembly Inactive File.

   AB 1437 (Koretz) would generally require every pharmaceutical manufacturing company to disclose to the State Department of Health Services the value, nature, and purpose of any gift, fee, payment, subsidy, or other economic benefit provided in connection with certain drug marketing activities. The bill has yet to be heard in a policy committee in the Assembly.

6. **Prior Related Legislation.** AB 2191 (Migden, Chapter 853, Statutes of 2002) included pharmaceutical companies in the CMIA disclosure restrictions.

   AB 456 (Speier, Chapter 635, Statutes of 2001), created the California Office of HIPAA Implementation to help identify when state confidentiality and privacy requirements for medical information are more or less stringent than HIPAA.

SUPPORT AND OPPOSITION:

Support: Office of HIPAA Implementation (Sponsor)
California Medical Association (Sponsor)
California Labor Federation
American Civil Liberties Union
California Nurses Association
Consumers Union
Gray Panthers
Orange County Fire Authority
Privacy Rights Clearinghouse
Protection & Advocacy, Inc.
Western Center on Law and Poverty

Oppose Unless Amended:
Amgen
Arclight Systems
AstraZeneca Pharmaceuticals, LP
Bristol-Myers Squibb Company
California Healthcare Institute
California Retailers Association
Cephalon, Inc.
CANJI, Inc.
DNAX Research, Inc.
GlaxoSmithKline
IMS Health Incorporated
Johnson & Johnson
McKesson Corporation
Novartis Pharmaceuticals
Pharmaceutical Research and Manufacturers of America
Quintiles Transnational Corp.
Schering-Plough

Consultant: Bill Gage

EXHIBIT C

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

AB 715

THIRD READING

Bill No: AB 715
Author: Chan (D), et al
Amended: 9/10/03 in Senate
Vote: 21

PRIOR COMMITTEE VOTES NOT RELEVANT

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: Not relevant

SUBJECT: Personal information

SOURCE: Author

DIGEST: Senate floor amendments of 9/8/03 delete contents of the bill and take large portions of AB 262 (Chan), relating to pharmaceutical marketing practices, and place them into this bill. AB 262 passed the Senate Judiciary Committee on a 5-1 vote. (See Analysis section below.)

ANALYSIS: This bill addresses the subject of communications by health care providers and plans to patients, where those communications are paid for by third parties (such as pharmaceutical companies). The provisions generally prohibit remunerated communication, with various exceptions negotiated between the bill's sponsor (the Office of HIPAA Implementation) and representatives of health plans and pharmaceutical companies. First, the bill exempts various communications to health plan enrollees that are needed to inform them of their benefits and plan procedures. Second, the bill exempts various treatment-related communications, so long as those communications are not remunerated. Finally, the bill exempts remunerated "disease management" communications for seriously debilitating or life-

CONTINUED

AB 715 (Chan) **Oppose**
File Item # 133
Assembly Floor: Vote Not Relevant (Gut and Amend)
Senate Education: Vote Not Relevant (Gut and Amend)
Vote requirement: 21
Version Date: 9/10/03

Quick Summary

This bill is a gut and amend on the Senate floor that takes provisions from AB 262 (Chan) and places them into this bill. This bill circumvents the legislative process and can wait until next year to move forward.
This bill muddies California's medical privacy law by requiring that a health care provider or health plan contractor obtain a patient's permission before the patient's medical information can be used for marketing purposes. Includes a prohibition on pharmacies providing data to suppliers, which would be used to market directly to physicians.

Fiscal Effect

MINOR COSTS.

State. This bill would have no fiscal impact.

Fiscal Comments
This bill defines communication methods pharmaceutical companies can use when marketing products.

Fiscal Consultant: Sharon Bishop/MM

Digest

Medical Privacy Law Clarification

Prohibits a health care provider and a health care service plan contractor from marketing a patient's medical information for any purpose not necessary to provide health care services unless expressly authorized by the patient.

Requires any such authorization forms be printed in 14-point type.

Defines **"marketing"** as a communication about a product or service that encourages recipients of the communication to purchase or use the product or service.

Current federal law, the *Health Insurance Portability and Accountability Act* ("HIPAA"), requires that a health care provider or health plan obtain an authorization from the patient for any use or disclosure of protected health information for marketing, unless the communication is face-to-face communication or is a promotional gift of nominal value.

Existing law requires that specified printed authorizations for the disclosure of medical information be in 8-point type.

Assembly Bill 262 (Chan) of 2003 requires that a health care provider or health plan contractor obtain a patient's permission before the patient's medical information can be used for marketing purposes. Furthermore, the bill creates a DO NOT USE list maintained by the Attorney General whereby pharmaceutical companies may not use information and statistics about individual physicians' prescribing proscribing for marketing purposes, and authorizes the Attorney General to **charge physicians a fee** for inclusion on the list. (Pending in Senate Rules)

Senate Bill 598 (Machado) of 2003 revises and further limits the circumstances under which a provider of health care, health care service plan, or contractor may release medical information that relates to the patient's participation in outpatient treatment with a psychotherapist unless specifically authorized by the patient or the patient's representative for each release. Currently pending in Assembly Judiciary. Senate Floor Vote: 25-12 (AYE: Aanestad and McPherson; NO: All other Republicans except ABS: Morrow)

Assembly Bill 2191 (Migden) of 2002 prohibits pharmaceutical companies or their representatives from disclosing medical information without first obtaining an authorization. Also it requires pharmaceutical companies or their representatives to adhere to specified procedures regarding the maintenance, disposal, and release of medical information and records. Senate Floor Vote: 27-12 (AYE: McPherson; NO: All other Republicans).

Senate Bill 456 (Speier) of 2001, the *Health Insurance Portability and Accountability Implementation Act of 2001*, created the California Office of HIPAA Implementation (CalOHI) within the Health and Human Services Agency. CalOHI was created to assume leadership for the State's HIPAA activities, including identifying when state confidentiality and privacy requirements for medical information are more or less stringent than HIPAA. Senate Republican Members' vote: 4-7 (AYE: Aanestad, Ashburn, McPherson, Margett; NO: Ackerman, Battin, Brulte, Knight, McClintock, Morrow, Oller; ABS: Hollingsworth, Johnson , Poochigian).

Senate Rule 38.5 provides that every amendment proposed must be germane. In order to be germane, an amendment must relate to the same subject as the original bill, resolution, or other question under consideration.

It is beyond dispute that medical information should be protected. This bill would provide more protection for health information; however, it may constrain appropriate activities, including reminders about prescriptions. Furthermore, this bill keeps changing and modifying how it will address the problem it is attempting to remedy. There is no urgency for the government to intervene in this matter.

Support & Opposition Received

Support:
American Civil Liberties Union (ACLU)
California Medical Association
California Office of HIPAA Implementation
Consumers Union
Privacy Rights Clearinghouse
Protection & Advocacy, Inc.
Western Center on Law and Poverty

Opposition:
Astra-Zeneca Pharmaceuticals
Glaxo-Smith-Kline
Canji, Inc.
Johnson and Johnson
Note: All oppose unless amended as of version 9/8/03.

Senate Republican Office of Policy/*Martin Ruano*

EXHIBIT D

management organization, as defined in Section 1399.900 of the Health and Safety Code, that complies fully with the physician authorization requirements of Section 1399.902 of the Health and Safety Code, provided that the health care service plan or its contractor provides or has provided a description of the disease management services to a treating physician or to the health care service plan's or contractor's network of physicians. Nothing in this paragraph shall be construed to require physician authorization for the care or treatment of the adherents of any well-recognized church or religious denomination who depend solely upon prayer or spiritual means for healing in the practice of the religion of that church or denomination.

(18) The information may be disclosed, as permitted by state and federal law or regulation, to a local health department for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions, as authorized or required by state or federal law or regulation.

(d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan, contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, use for marketing, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.

(e) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no contractor or corporation and its subsidiaries and affiliates shall further disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan or insurer or self-insured employer received under this section to any person or entity that is not engaged in providing direct health care services to the patient or his or her provider of health care or health care service plan or insurer or self-insured employer.

(Added by Stats.2000, c. 1068 (A.B.1836), § 1.16, operative Jan. 1, 2003. Amended by Stats.2002, c. 123 (A.B.1958), § 1, operative Jan. 1, 2003; Stats.2003, c. 562 (A.B.715), § 2; Stats.2006, c. 874 (S.B.1430), § 2.)

Historical and Statutory Notes

Addition of a section of this number by §§ 1.9, 1.10, 1.11, 1.12, 1.13, 1.14 and 1.15 of Stats.2000, c. 1068, failed to become operative under the provisions of § 5 of that Act.

Stats.2002, c. 123 (A.B.1958), in subd. (b), inserted a new par. (8) and renumbered as par. (9) former par. (8); and, in subd. (c), added "when requested for all purposes not included in paragraph (8) of subdivision (b)", at the end of par. (6), and made nonsubstantive changes in par. (15).

The 2002 amendment of this section by c. 123 explicitly amended the 2000 addition of this section by c. 1068, § 1.16.

Stats.2003, c. 562 (A.B.715), in subd. (d), inserted "use for marketing," and made a nonsubstantive change; and deleted subd. (f), which had read: "(f) This section shall become operative January 1, 2003."

For letter of intent regarding Stats.2003, c. 562 (A.B.715), see Historical and Statutory Notes under Civil Code § 56.05.

Stats.2006, c. 874 (S.B.1430), in subd. (c), added par. (18) relating to disclosure to government officials and made a nonsubstantive change to correct grammar.

Section 1 of Stats.2006, c. 874 (S.B.1430), provides:

EXHIBIT E

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SAN DIEGO, CALIFORNIA 92101-3579
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May 16, 2008

PRIVILEGED / CONFIDENTIAL
VIA FEDERAL EXPRESS

Kathlene W. Lowe, Esq.
Dorsey & Whitney LLP
38 Technology Drive, Suite 100
Irvine, CA 92618-5310

Re: Complaint For Albertsons Commercial Use of Patient Prescription Information

Dear Ms. Lowe,

Enclosed is a class action complaint we prepared alleging that Albertsons' practice of selling the information contained in patient prescriptions violates California law.

It is forwarded to you (alone) prior to filing and service as a courtesy in the event the pendency of the action influences consideration of our earlier proposal regarding Weisz.

We intend to file the action on Wednesday, May 21, 2008, unless your earlier call provides a reason to postpone that intention.

Sincerely,

FINKELSTEIN & KRINSK LLP

Jeffrey R. Krinsk

JRK:cpc
Enclosure
cc: Mark L. Knutson, Esq.

DRAFT DRAFT DRAFT

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Attorneys for Class Plaintiff
Raymond W. London

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, v. **NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA),** LLC, and DOES 1 through 25, inclusive, Defendants.	Case No. CLASS ACTION COMPLAINT **(1) VIOLATION OF THE CONFIDENTIALITY OF MEDICAL INFORMATION ACT [Cal. Civ. C. §§56, *et seq.*];** **(2) BREACH OF IMPLIED IN FACT CONTRACT;** **(3) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;** **(4) SUPPRESSION OF FACT;** **(5) BREACH OF PRIVACY;** **(6) UNJUST ENRICHMENT;** **(7) TRESPASS TO PERSONALTY;** **(8) VIOLATION OF UNFAIR COMPETITION LAWS; AND** **(9) VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT** JURY TRIAL DEMANDED

I. INTRODUCTION

1. Plaintiff Raymond W. London ("Plaintiff" and/or "London") brings this Class action on behalf of himself as a consumer and prescription drug patient of Defendants New Albertson's, Inc. and Cerberus Capital Management (California) LLC their affiliated retail pharmacy stores operating under the trade names of Albertsons, Sav-On Drug, Osco Drug, and Jewel Osco Drug, and on behalf of all similarly situated California resident prescription drug patients. Plaintiff London has been directly injured by Defendants' practices and activities within the applicable statute of limitations on each of the claims asserted herein. By his undersigned attorneys, Plaintiff alleges as to himself and his own actions, as set forth below, are based upon her personal knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel or admissions by the named Defendants in public filings, documents or otherwise.

2. Plaintiff London proceeds as the putative Class representative. At all time materials he was a prescription drug patient of Defendants, and lost money and property and suffered damage as a result of the Defendants' improper, unlawful, unfair and deceptive prescription drug marketing practices. London seeks equitable remedies as available under California law, statutory damages, and compensatory and punitive damages which he and other Class members are entitled to receive as a result of the Defendants' activities causing injury and damage to Plaintiff (and, *ergo*, the Class) including: (1) depriving Plaintiff and the Class of the exclusive use and control over his/her prescription information, personal property both valuable and saleable but the value thereof sold and proceeds retained by Defendants; (2) violation of the Confidentiality of Medical Information Act [Cal. Civ. Code §56, *et al.*] (the "CMIA"), providing for statutory damages of at least $1,000 per Class member; (3) violation of California's Consumers Legal Remedies Act and Unfair Competition Laws; (4) compensatory and punitive damages as a result of Defendants' tortious conduct, including the improper, unauthorized sale of patient prescription information; and (5) Albertsons' disregard of its representations and/or implied terms and conditions of serving its patients, as hereafter particularized.

II. NATURE OF THE ACTION

3. Plaintiff London brings this lawsuit against New Albertson's, Inc., and Cerberus Capital Management (California) LLC. ("New Albertson's" and "Cerberus," respectively, or collectively the "Defendants"), as a representative/private attorney general lawsuit and as a Class action on behalf of himself and other similarly situated California residents that are prescription drug patients of the Defendants. As mentioned above, Defendants own and operate the California retail pharmacy operations carrying the trade names "Albertsons," "Sav-On-Drug," "Osco Drug," and "Jewel-Osco" (hereinafter "Albertsons Pharmacy").

4. Plaintiff London and the Class seek damages and other remedies resulting from the claims particularized herein against Defendants for violation of the CMIA, as well as damages and/or equitable relief based on the statutory and common law violations of Defendants asserted below arising out of the systematic, unlawful and wrongful actions of Defendants in selling Plaintiff and the Class member's prescription information to data mining companies that, in turn, sell it to pharmaceutical companies for unauthorized marketing and other purposes.

5. This action seeks to eliminate Defendants' practice in California of selling, without patient consent or authorization or disclosure to Albertsons Pharmacy patients, their prescription information imparted by the patient to an Albertsons Pharmacy solely for the purpose of having his/her prescription filled in accordance with his/her doctor(s) (or other care givers) prescription.

6. Defendants' use of a patient's valuable prescription information (without the patient's knowledge or consent) is part of the marketing campaign undertaken by pharmaceutical companies that use it to increase prescription drugs sales of their drug products. Pharmaceutical companies pay the data mining firms for patient prescription information in order to increase the sale of their drugs. Defendants sell Plaintiff and the Class members' prescription information in order to allow the recipients to identify the precise prescription writing habits of particular doctor(s) (or other care givers) and thereby to enhance the pharmaceutical industries' marketing effectiveness in using huge cadres of representatives, called "detail men" or "detail women" who confront doctors at their places of business armed with the resulting information and, invariably, reward them for continuing or altering their prescription writing regimen.

7. The Defendants' conduct is unlawful in California though central to the marketing of high cost, non-generic prescription drugs in much of the country. It is only through Defendants' agreement with these data mining companies (such as IMS Health, Inc., or Verispan, Inc., both patient information "data mining" companies) that the patients prescription information of an Albertsons Pharmacy is sold to facilitate the drug marketing programs of large pharmaceutical companies. This systematic practice is a highly profitable scheme continuously carried out by the Defendants within the applicable statute of limitations. It consists of (at least) the following sequence of wrongful acts and practices:

A. Consumers like Plaintiff London provide their drug prescription containing their confidential prescription information to a pharmacist or pharmacy technician working at a retail Albertsons Pharmacy in order to have the prescription filled (or refilled).

B. This prescription information is valuable property (evidenced by the payments Defendants routinely receive for this information from the data mining companies that first receive it) that include personally identifiable medical information and, *inter alia*, the patient's name, address, telephone number, the medication he/she has been prescribed (for which there is an unique numerical national drug code (NDC)), and the prescribing physician number (for which there is also an unique FDA-sanctioned numerical identifier), the dosage and quantity of the prescribed drug, and the date the prescription was filled.

C. The prescription information, in whole or part, is the property of the patient and not the property of Defendants. This patient property should be maintained by Defendants as the law requires and not sold, in whole or part, as doing so is not authorized or consented to by the patient. Patients do not expect a use of their personal medical information except for the purposes allowed by law and the purpose of filling his/her prescription. The allowed by law purposes are essentially limited to processing health insurance and similar payment requirements, public health emergencies, or other narrow uses that exclude the use by Defendants described herein. Defendants' prescription drug patients are never asked, and never authorize, the use of their prescription information in the way that occurs by Defendants' sale to data mining firms for use in marketing by large pharmaceutical companies.

8. Defendants promote their access to Albertsons Pharmacy patient prescription information, recognizing that pharmaceutical companies will use it to increase the sale of their drugs. Defendants enter into contracts with data mining companies paying them for some, or all, of the information contained in patient prescriptions entrusted to their retail pharmacist for the purpose, and only the purpose, of filling a patient's prescription.

9. A lucrative market exits for data identifying the prescribing practices of individual health care providers ("prescription-identifiable data"). Defendants acquire prescription data in the ordinary course of their retail pharmacy business. Data mining companies (such as IMS Health, Inc. and Verispan, LLC) purchase the prescription data from Defendants, have information identifying individual patients removed before transmission by the data mining company to its pharmaceutical company clients, combine what remains with data allowing identification of the doctor prescriber, and sell the resulting data to interested purchasers. The data miners' biggest clients by far are pharmaceutical companies, which use the data to develop marketing plans targeted to specific prescribers.

10. Specifically, approximately 1.4 million licensed health care providers are authorized to write prescriptions in the United States for approximately 8,000 different pharmaceutical products in various forms, strengths, and doses. The prescriptions are filed by approximately 54,000 retail pharmacies and other licensed medical facilities throughout the United States. Retail pharmacies acquire prescription data during the regular course of business. For each prescription filled, a record is kept that includes the name of the patient, information identifying the prescribers, the name, dosage, and quantity of the prescribed drug, and the date the prescription was filled. At each Albertsons Pharmacy location store, including those located in California, the patient's prescription data is ultimately aggregated with data from other outlets and stored in a central database maintained, operated and controlled by Defendants.

11. Data mining firms like IMS and Verispan are the world's leading providers of information, research, and analysis to the pharmaceutical and health care industries. IMS is the largest business in the field. It purchases prescription information from approximately 100 different suppliers. Verispan is smaller and obtains its information from approximately thirty to forty

suppliers. These two data mining firms collectively acquire and analyze data from billions of prescription transactions per year throughout the United States.

12. Data mining firms like IMS and Verispan purchase prescription information including prescriber-identifiable data from Defendants. To (ostensively) comply with California laws protecting patient privacy, Defendants allows data mining firms to install software on Albertsons' mainframe computer servers that captures and eventually patient prescription information as it is transferred to the data mining firms' computers. After patient information is "de-identified," a number is assigned to each de-identified patient that permits prescription information to be correlated for each patient but, *purportedly* does not allow the patient's identity to be determined. The prescription information, including prescription information processed by Defendants' California retail pharmacy stores, is thereafter transferred to the data mining firms' computers where it is combined to allow physician identification and is then made available to pharmaceutical companies.

13. Elaborating on the prior paragraph, one way the data mining companies add value to Albertsons Pharmacy prescriber-identifiable data is to combine it with prescriber reference information. This allows the data mining companies to, among other things, match each prescription to the correct prescriber, identify and use the prescriber's correct name, and add his/her address, speciality, and other professional information about the prescriber to the prescription data. Prescriber preference files are created using information obtained from various sources, including the American Medical Association's ("AMA") Physician Masterfile. The AMA's Masterfile contains demographic, educational, certification, licensure, and speciality information for more than 800,000 active U.S. medical doctors and over 90 percent of osteopathic doctors. The data mining companies use the patient prescription data, together with the reference file data, to produce a variety of patient de-identified databases.

14. The biggest end-clients by far for Albertsons Pharmacy patients' prescription information are pharmaceutical companies. According to a 2005 report of a data mining company "[s]ales to the pharmaceutical industry accounted for substantially all of [IMS's] revenue in 2005, 2004 and 2003". In limited instances, however, the data miners also provide prescriber identifiable information to biotechnology firms, pharmaceutical distributors, government agencies, insurance

companies, heath care groups, researchers, consulting organizations, the financial community, manufacturers of generic drugs, pharmacy benefit managers, and others, but this is only a small percentage of business compared to sales to pharmaceutical companies. The pharmaceutical companies commit vast resources to the marketing of prescription drugs. In 2000, the pharmaceutical industry spent approximately $15.7 billion on marketing, $4 billion of which was dedicated to direct-to-physician drug marketing strategies. More recent estimates suggest the industry currently spends between $25 billion and $30 billion per year on marketing. The large pharmaceutical companies spend roughly 30 percent of their revenues on promotion, marketing, and administration, while spending only approximately 13 percent on research and development. Pharmaceutical companies depend heavily on the direct to physician marketing resulting from Defendants' sale of prescription information to market to doctors and other health care providers. The pharmaceutical companies' direct marketing practice that is most relevant to this lawsuit is their use of "detailing" to persuade individual health care providers to prescribe specific brand-name drugs.

15. Pharmaceutical detailing generally involves providing promotional and educational information during face-to-face contact between sales representatives and health care providers. Sales representatives provide prescribers with both written and oral information about particular drugs in an effort to persuade them to prescribe the drugs being detailed. They also offer prescribers free samples that can then be distributed to patients at no charge and provide other inducements. Because many prescribers are reluctant to meet with sales representatives, small gifts, free meals, and similar inducements, are frequently offered to health care providers and their staffs in an effort to facilitate access and encourage receptivity to the pharmaceutical company representative's sales pitch for a given brand-name drug.

A. Promotional Information

Pharmaceutical companies strictly control the information that detailers are authorized to present on their behalf. Although sales representatives may provide prescribers with accurate information, misstatements and omissions occur. A 1995 study published in the Journal of the American Medical Association concluded that 11 percent of the in-person statements made to physicians by pharmaceutical sales representatives contradicted information that was readily available to them. Michael G. Ziegler, Pauline Lew, and Brian C. Singer, *The Accuracy of Drug Information From Pharmaceutical Sales Representatives*, 273 JAMA 1296-98 (1995).

B. Sampling

Product sampling is widely used in the direct to physician marketing of prescription drugs. Published reports estimate that the total annual retail value of sampled drugs exceeds $11 billion. Product sampling programs permit pharmaceutical company sales representatives to use sampled drugs as inducements to facilitate access to prescribers. They also promote sales by allowing prescribers to become familiar with the sampled drugs and by increasing the likelihood that patients will continue to request prescriptions for sampled drugs after their sample has been consumed.

C. Gifts, Meals and Other Inducements

Prescribers are often reluctant to meet with sales representatives. In an effort to overcome this reluctance, sales representatives provide health care providers and their staffs with small gifts, free meals, and other similar inducements. In addition to facilitating access, such inducements help sales representatives build relationships with prescribers that can make them more receptive to the product information that sales representative provide.

D. Effectiveness of Detailing

Detailing is principally used only to market prescription drugs having patent protection. After the patents on a brand-name drug expire, competitors can obtain approval to sell generic bio equivalent versions of the drug. Generic drugs are generally substantially less expensive than their brand-name equivalents, and bio-equivalent generic drugs are equally effective for most patients. California law authorizes pharmacies to substitute a bioequivalent generic drug for a branded drug unless the prescriber specifies that the brand-name drug is not to be substituted. Accordingly, sales of brand-name drugs fall substantially after bio-equivalent generic drugs become available and detailing at that point is no longer seen as a cost-effective marketing technique. However, pharmaceutical companies continue to heavily market brand-name drugs as treatments for conditions that can also be treated with generic alternatives that are not bio-equivalent. For example, although depression can be treated for many patients with generic form of Prozac, several pharmaceutical companies also market different brand-name medications as a treatment for depression. Because brand-name medications are often substantially more expensive that bio-equivalent generic alternatives, those patients who achieve the same benefits from a non-bioequivalent generic medication can save money by substituting the non-bioequivalent generic medication for a branded alternative. In such situations, detailing can be an affective marketing technique for brand-name drugs. Detailing works by, among other things: (i) building name recognition among prescribers for the drug being detailed; (ii) providing information about the drug to prescribers in a form that is designed to be persuasive; (iii) providing inducements to providers consisting of free samples, small gifts, and meals that facilitate access and foster relationships between the sales representatives and health care providers.

16. Pharmaceutical companies use prescriber-identifiable data of the type provided by Defendants for a number of purposes with the targeting of prescribers for detailing while tailoring messages most prominent. The process includes evaluating the effectiveness of detailing. Marketing constitutes by far the most prevalent use pf prescription data and the dynamic driving the sale of prescription information to data mining firms.

A. Targeting

Pharmaceutical companies use prescriber-identifiable data to analyze the prescribing practices of specific health care providers. For example, pharmaceutical companies use prescriber-identifiable information when introducing new drugs to identify "early adopters" who have demonstrated by their past prescribing practices that they are disposed to prescribe new medications. They also use prescriber-identifiable data to identify health care providers who have recently changed their prescribing practices with respect to specific drugs, those who are prescribing large quantities of the drugs that the detailer is selling, and those who are prescribing competing drugs. Targeting health care providers in this manner enables pharmaceutical companies to efficiently allocate resources by providing samples to and detailing for those providers most likely to be responsive.

B. Tailoring

Pharmaceutical companies use prescriber-identifiable data to tailor their marketing messages to specific health care providers. For example, a sales representative might mention during a detailing session that the drug she is detailing does not have a specific side effect that is associated with a competing drug that the health care provider is currently prescribing.

C. Measuring the Effectiveness of Detailing

Prescriber-identifiable data is used to measure the effectiveness of detailing. Companies use the data to identify the ratio of brand-name to generic drugs prescribed, assess the success of or resistance of detailer visits, and measure the effectiveness of larger marketing campaigns and detail personnel. In this way, manufacturers adjust the marketing message that detailers bring to individual health care providers.

17. The overall effect of Defendants' practices relative to selling patient prescription information to be used to create prescriber-identifiable data is, according to numerous health care advocates and legislature, an increase in prescription drug costs for patients, employers and the state Medi-Cal program. One state representative (not from California) recently testified at a hearing on this subject and compared the annual costs to Medicaid of a branded calcium channel blocker and a generic calcium channel blocker to purportedly demonstrate state savings that would occur if the sale of prescription information ceased. She claimed that a one-year supply of the branded drug (Dynacirc) would cost Medicaid $1,047, while a one-year supply of the purported equally effective generic drug (Verapamil) would cost only $162. The same representative also submitted a short research paper written by Emily Clayton, a health care advocate for the California Public Interest Research Group (CALPIRG) (see Emily Clayton, *Tis Always The Season For Giving: A White Paper on the Practices and Problems of Pharmaceutical Detailing,* CALPIRG, Sept. 2004, available at http://calpirg.org/reports/TistheSeasonFor Giving04.pdf.). In the report, Clayton briefly explained that pharmaceutical companies purchase aggregated prescriber information from data mining companies and then use it "to specifically target their sales pitches when they meet with doctors." Based on Ms. Clayton's review of several other studies she concluded that detailing causes public

mistrust of prescriber decisions, increased drug costs, and the provision of incomplete and/or misleading information to prescribers.

18. In chorus with the above, a representative of the Department of Health and Human Services ("DHHS") also recently discussed the large commercial market for prescriber-identifiable data, stating that commercial use of this information violates the prescribers' (*i.e.*, the doctors') "trade secrets." According to this representative, DHHS

> believes that these activities ultimately drive up the cost of prescription drugs and the cost of health care in the aggregate. . . .It would be hard for us to quantify what that impact might be, but I find it unlikely the drug companies are sending detail[ers] into doctors' offices for the purpose of selling doctors cheaper medication. In fact, I'm confident that, if you're a doctor, that one of the best ways to get a detailer into your office would be if you switched to prescribing a generic drug over a branded drug.

19. According to further testimony on this subject, some detailers use prescriber-identifiable information to put improper pressure on prescribers. One anecdote shared by a nurse practitioner speaking in favor of restricting pharmaceutical company access to patient prescription data highlighted the alleged problem as follows:

> For the past several months, a drug rep has been bringing coffee to our office on Tuesday mornings. We have never asked her to continue doing this since we have a coffee pot, and we routinely make coffee for our staff and our patients. But she does it anyway, which is very nice of her. She calls this "Two for Tuesday." The problem is that every week she also says to me, "If you don't write 2 more prescriptions for my brand today, I'm not going to be able to continue bringing coffee." I prescribe her drug when it is right for my patients. There are many times when it is not right.
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> We feel pressure from her to prescribe her product even though we have never asked to bring coffee. This may sound like a small thing, but I feel that since she knows exactly how many prescriptions I write each week for her drug versus the competition, she is expecting a quid pro quo.

20. A similar anecdote is described in a January 2006 article in the New York Times. According to the article, a district manager for a pharmaceutical company sent an e-mail to detailers in which she stated that:

> [O]ur goal is 20 or more scripts per week for each territory. If you are not achieving this goal, ask yourself if those doctors that you have such great relationships with are being fair to you. Hold them accountable for all the time, samples, lunches, dinners, programs, and past preceptorships that you have provided or paid for and get the business!! You can do it!!

21. In accordance with the preceding paragraphs, not only are the Defendants' practices improper providing information owned by pharmacy patients for its exclusive profit, violating the

implied agreement they maintain with their pharmacy patients and doing so by using false or incomplete representations, while violating applicable statutes, but an end to Defendants' practice in this regard would greatly benefit the immediate problem in California of enormous health care costs.

III. JURISDICTION AND VENUE

22. This court has jurisdiction over this action pursuant to the California Constitution, Article VI, Section 10, Bus. & Prof. Code § 17203, and Code of Civil Procedure § 382.

23. Venue is proper in this Court because a substantial or significant portion of the conduct complained of herein has occurred and occurs in this county as Defendants' retail pharmacies are prevalent and conduct business under the trade names "Albertsons," "Sav-On-Drug," "Osco Drug," and "Jewel-Osco." Similarly, the Defendants' business practices and wrongful acts have occurred and continue to occur in this county, and the adverse effects of Defendants' wrongful conduct has harmed and continue to harm the residents of San Diego County (and the remainder of the state).

24. Defendants actively participate in substantial business activities in California and this county and intentionally avail themselves of the advantages of doing business in California and this county. Defendants extensively market and advertise in California while soliciting and conducting their pharmacy operations throughout the state.

IV. THE PARTIES

25. Plaintiff London brings this action on behalf of himself and all other similarly situated California residents to force Defendants to halt their illegal and unfair business practices, and establish the amounts owing to the members of the Class, either as restitution, disgorgement or monetary damages, under the theories of liability pled herein. Plaintiff London also seeks to end the practices of Defendants to prevent their its future misconduct relating to the sale of patient private health/medical prescription information. Albertsons' misconduct under California law includes resulting in paying statutory damages under the CMIA of not less than $1,000.00 per sale of each patients' medical information. Plaintiff London is and at all relevant time has been a resident of California residing at Orange County, California. While a California consumer, Plaintiff London

has been a patient of Defendants (at Sav-On Drugs) and has been adversely affected and damaged in fact by the activities described herein. He brings this action to gain the protection given California residents by the CMIA, Article I, Section 1, of the California Constitution (guaranteeing constitutional privacy), certain of California's statutory and common law rights prohibiting Defendants' business practices (in tort or contract) and prays that Defendants be held liable per the above and for Defendants' trespass, breach of implied contract, negligence, breach of implied covenants accompanying Plaintiff London's implied contract with Defendants, suppression of fact, invasion of privacy and CMIA, CLRA and UCL violations, each as elaborated herein.

26. At all times material, Boise, Idaho-based Defendant New Albertson's, Inc. was, and remains, a Delaware corporation that owns and operates (with defendants Cerberus) of one of the largest combined retail grocery store and pharmacy chains in California, conducting business under the trade names "Albertsons," "Sav-On-Drug," "Osco Drug," and "Jewel-Osco."

27. At all times material, Defendant Cerberus Capital Management (California) LLC was, and remains a limited liability company formed under Delaware law with its principal headquarters located at 1601 Cloverfield Blvd., 2nd Floor, South Tower, Santa Monica, California.

28. Combined, Albertsons Pharmacy operations generate over $30 billion in revenue nationwide and purports to employ over 8,000 licensed pharmacists for this purpose.

V. DEFENDANTS' REPRESENTATIONS CONCERNING MEDICAL RECORDS

29. At all relevant times Defendants effectively made material misrepresentations in the form of Albertsons Pharmacy brochures, pamphlets, and advertisements (and on the Albertson Pharmacy Internet web site) to Plaintiff and the Class regarding the degree to which patient prescription and medical records and information would remain confidential and used only for limited purposes that included or paralleled the following:

> Albertsons (also known as Sav-on Drugs, Sav-on Pharmacy, Osco Drug, Jewel-Osco, Acme & Shaws) is committed to a responsible and innovative pharmacy practice allowing us to meet the health care needs of our patients. Pharmacy is the cornerstone of our business and will continue to grow to meet the needs of our patients.
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Albertsons pharmacy systems incorporate strict controls to protect the privacy of our patients personal health information by only allowing access to this information by the trusted health professionals in the pharmacy.

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Albertsons is committed to protecting your privacy and understands the importance of safeguarding your personal health information. We are required by federal law to maintain the privacy of health information that identifies you or that could be used to identify you (known as "Protected Health Information"). We also are required to provide you with this Notice, which explains our legal duties and privacy practices with respect to Protected Health Information that we collect and maintain.

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USES AND DISCLOSURES OF PROTECTED HEALTH INFORMATION

Routine Uses and Disclosures of Protected Health Information for Treatment, Payment, or Health Care Operations

Albertsons is permitted under federal law to use and disclose Protected Health Information without your specific permission for three types of routine purposes: treatment, payment, and health care operations.

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Treatment. Your Protected Health Information can be used and disclosed by Albertsons for treatment purposes. For example, your Protected Health Information will be used by our pharmacists to fill your prescription and to counsel you about the appropriate use of your medication.

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Other Restrictions on Uses and Disclosures of Protected Health Information

The uses and disclosures of your Protected Health Information described above are permitted or required by federal law. Some states have laws that require additional privacy safeguards above and beyond the federal requirements. Thus, if a state law is more restrictive regarding uses and disclosures of your Protected Health Information or provides you with greater rights with respect to your Protected Health Information, Albertsons will comply with the state law. If your state has enacted a more stringent law, we have attached as an addendum to this Notice our privacy practices regarding your Protected Health Information in that state.

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Other uses and disclosures of your Protected Health Information, not described above, will be made only with your written authorization. You may revoke this authorization at any time, in writing, except to the extent that we have taken action in reliance on the authorization.

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Our responsibilities
This Pharmacy is required by law to:
Maintain the privacy of your health information

30. In addition to Albertsons' exemplar representations set forth in the preceding paragraph, Plaintiff believes substantial additional uniform material representations by Albertsons to its pharmacy patients during the class period that parallel the above will be available through discovery.

VI. CLASS ACTION ALLEGATIONS

31. Plaintiff London brings this representative action on behalf of himself and on behalf of all other similarly situated California-resident Albertsons Pharmacy patients and members and as applicable, of the general public of California (the "Class"). The proposed Class which Plaintiff London seeks to represent is defined as

> All California residents who, as of the date of the commencement of this action and within the applicable limitations period(s), filled a prescription at an Albertsons, Sav-On Drug, Osco Drug, or Jewel Osco pharmacy and, thereafter, had their prescription medical information sold, shared, or otherwise used by a database mining company engaged by Defendants without the patient's prior written authorization.

32. Excluded from the Class are the Defendants, their predecessors, parents, subsidiaries, and affiliated entities; any entity in which any of them has a controlling interest; any employees, officers or directors of any of them; and any of their legal representatives, heirs, successors and assignees.

33. The amount of individual compensatory damages, restitution or disgorgement, and *pro rata* share of any attorney fees and punitive damages awardable to Plaintiff London and each Class member pursuant to this action, is below the $75,000 jurisdictional requirement for the original filing of this action in the United States District Court pursuant to 28 U.S.C. §1332 or the removal of this action to the United States District Court pursuant to 28 U.S.C. §1441.

34. This action may properly be maintained as a Class action pursuant to Cal. Code of Civil Proc. § 382 and Cal. Civil Code § 1781.

35. The members of the Class are so numerous that joinder of their individual claims is impracticable. Plaintiff London is informed and believes, and on that basis alleges, that there are thousands of members of the proposed Class. The precise number of Class members and their addresses are presently unknown to Plaintiff London, but can be easily obtained from Defendants'

files and records. Further, Class members can be notified of the pendency of this action by published and/or mailed notice and the process is not difficult or complicated.

36. Common questions of law and fact exist as to all members of the Class. These questions predominate over questions affecting only individual Class members. These common legal and factual questions include, but are not limited to:

(a) Whether Defendants are liable for their activities in accordance with the CMIA and the amount of statutory damage thus owing;

(b) Whether Defendants are liable for violating privacy rights including informational privacy and the amount of damages;

(c) Whether Defendants breached their implied-in-fact contract with their pharmacy patients;

(d) Whether Defendants are liable for false and misleading advertising based on their communications and course of dealings with Albertsons Pharmacy patients;

(e) Whether Defendants' activities in selling patient prescription information is a violation of California law and/or operates as a fraud or deceit on the Class, is susceptible to Class treatment and, if so, the liability Defendants;

(f) Whether Defendants were obligated to but failed to act as a quasi-fiduciary to members of the Class;

(g) Whether Defendants are liable for suppression of fact to Plaintiff London and the Class;

(h) Whether Defendants have acted in breach of the implied covenant of good faith and fair dealing;

(i) The nature and extent of damages, equitable and other remedies to which Plaintiff London and the other members of the Class are entitled; and

(j) Have the Defendants been unjustly enriched and, if so, the damages owed as a result.

37. Plaintiff London's claims are typical of the claims of the other members of the Class. London and each of the members of the putative Class provided Defendants with a prescription

containing personal patient medical information that, without proper authorization or otherwise, was then shared, sold, or otherwise used in a manner providing significant profit/monies to Defendants.

38. Plaintiff London is an adequate representative of the Class because (a) his interests do not conflict with the interests of the individual members of the Class he seeks to represent; (b) he has retained counsel who are competent and experienced in complex Class action litigation; and (c) he intends to prosecute this action vigorously. The interests of the members of the Class will be fairly and adequately protected by London and his counsel.

39. Plaintiff London and the members of the Class have all sustained actual damage in that at the least each has lost money and property as a result of Defendants' conduct. Absent a Class action, Defendants will retain millions of dollars for selling information properly belonging to Plaintiff London and each member of the putative Class. Absent a Class action, each Class member will not receive suitable equitable relief and damages under, *inter alia,* the CMIA, CLRA, and other statutes and will continue to be victims of Defendants' violation of law. No justification exists for Defendants being allowed to retain the proceeds resulting from its sale of prescription information of patient prescriptions to third party data mining companies.

40. The Class action device is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff London and the Class. The damages suffered by the Class members may be too small to warrant the filing of individual suits. Moreover, the issues raised by Defendants' conduct may be too complex to be efficiently and cost effectively resolved in individual litigation. Hence, this Class action is the best method for all the Class members' common claims to be adjudicated in a single proceeding.

FIRST CAUSE OF ACTION

Violation Of The Confidentiality of Medical Information Act
California Civil Code §§56, *et seq.*
(Against All Defendants)

41. Plaintiff London incorporate by reference and realleges all paragraphs previously alleged herein.

42. The acts and practices of Defendants New Albertson's and Cerberus alleged in the Complaint constitute activities and practices that include the following:

A. Violation of the Confidentiality of Medical Information Act (CMIA"), Civil Code §§ 56, *et seq.* which, *inter alia*, at § 56.10, *et al.*, states:

1. **Prohibition on Unauthorized Disclosure of Medical Information**

> (a) No provider of health care, health care service plan, or contractor[1] shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization. . . . (emphasis added)
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> (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.[2] (emphasis added)
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> (e) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no contractor or corporation and its subsidiaries and affiliates shall further disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan or insurer or self-insured employer received under this section to any person or entity that is not engaged in providing direct health care services to the patient or his or her provider of health care or health care service plan or insurer or self-insured employer. (emphasis added)

43. At no time do New Albertson's or Cerberus solicit or receive the prior authorization or permission of its patients, Plaintiff and the Class though disclosing medical information regarding a patient of a health care provider and, separately, Defendants share, sell or use patient medical information for purposes not reasonably necessary or related to the providing of health care services.

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[1] Pharmacists and pharmacies are licensed pursuant to Chapter 9 of Division 2 of the Business and Professions Code and thus fall within the statutory definition relating to the regulation of health care set forth at CC §56.05(d). *See* Cal. Bus. & Prof. Code, §§ 4001, *et seq.*

[2] Effective January 1, 2004, this paragraph was amended to include the words "use for marketing" to clarify prohibited uses of confidential medical information (*i.e.* (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan, contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, **use for marketing,** or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.

44. Plaintiff London, individually and on behalf of the Class, requests that the Court find Defendants liable for violations of the CMIA provisions set forth hereinabove, finding Defendants' procedure for de-identifying "medical information" does not insulate them from liability pursuant to the CMIA and/or separately, that de-identified medical information as marketed by Defendants violates the CMIA as a prohibited "use" by Defendants prohibited by CMIA §56.10(d). In accordance with §§ 56.35 and/or § 56.36(b)(1), Plaintiff and the Class request that Defendants pay statutory damages of $1,000 for each sale of patient prescription information.

SECOND CAUSE OF ACTION

Breach of Implied In Fact Contract
(Against All Defendants)

45. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

46. Plaintiff London and the members of the Class provide confidential information contained in their prescriptions to an Albertsons Pharmacy based on Defendants' implied representation that the information will be treated as confidential and the content of patients' prescriptions will, absent authorization, be used for no purpose apart from satisfying the prescription owners pharmacy requirements or as required by law. The existence of the resulting implied agreement is manifested by the conduct of Plaintiff and the Class by entrusting his/her prescription to a Albertsons Pharmacy pharmacists (or pharmacy technician) and by Defendants, in turn, by accepting same for the purpose intended and for no other stated to or otherwise provided Plaintiff and the Class members. Both Plaintiff and Defendants accordingly manifested absent to the implied agreement. At no time were contractual terms other than as implied herein called to the attention of Plaintiff and the Class.

47. Plaintiff's implied representation is in accordance with §1704 of the California Pharmacy regulations, same prohibiting a pharmacist from revealing the content of any prescription to any person other than the patient or his/her authorized representative.

48. Defendants' marketing materials confirm the same limitation regarding the use by Albertsons of the content of patient prescriptions including that Defendants use will be for no other purpose except for filling of a patient's prescription(s).

49. As a result of the agreement between Defendants and Plaintiff London and the members of the Class, Plaintiff implied agreement prohibits Defendants from acting as heretofor described notwithstanding that Defendants receive consideration from Plaintiff London and the members of the Class for acting solely to satisfy prescription requirements or as the laws requires.

50. Defendants have breached this contract (implied in fact), and have deprived Plaintiff London and the Class of their property and its value as a result of said breach for which Plaintiff and the Class are entitled to recover.

THIRD CAUSE OF ACTION

Violation Of The Implied Covenant Of Good Faith And Fair Dealing (Against All Defendants)

51. Plaintiff London and the Class incorporate by reference and realleges paragraphs 1 through 40, inclusive, as though set forth at length herein.

52. It is well settled that in every contract there is an implied covenant that imposes upon each party as duty of good faith and fair dealing in its performance and its enforcement.

53. Contrary to the above requirement [and to the Restatement (Second) of Contracts § 205], Defendants breached their duty of good faith and fair dealing in the performance of the implied agreement by using the prescription information of Plaintiff and the Class for undisclosed commercial advantage including receiving money properly belonging to Plaintiff and the Class, realized by Defendants as a result of their subterfuge and evasions.

54. Defendants acted to prevent, frustrate or impede plaintiff and the class from enjoying the rights and benefits to which he/she was entitled by virtue of the implied contract between Defendants and plaintiff and the class.

55. Plaintiff and the Class did all things required by the implied agreement with Defendants and entrusted their prescription information to Albertsons Pharmacy personnel in the belief that Defendants would provide prescription services and that, *inter alia*, Defendants would

not use his/her prescription information, in any manner in violation of the law and not "use" Plaintiff's and the Class members' prescription information other than as authorized by Plaintiff and the Class except to satisfy the prescribers direction relative to the prescription and as required by law.

56. Defendants breached the covenant of good faith and fair dealing by, *inter alia*, acting as described above and in an objectively unreasonable fashion.

57. In acting in the manners described herein, Defendants violated the implied terms of its contractual commitments to Plaintiff and the Class and violated the terms and conditions that existed as manifested by Defendants through their activities with Plaintiff and the Class. Plaintiff has also incurred damages as a result of Defendants' breaches of the implied covenant of good faith and fair dealing attaching to their contractual obligations.

FOURTH CAUSE OF ACTION

Suppression of Fact
(Against All Defendants)

58. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

59. Defendants failed to disclose material facts required to be provided London and members of the Class by virtue of the special relationship between Defendants' pharmacies and their patients. This duty emanates from the trust and confidence reasonably placed by Plaintiff London and the Class in Defendants and, more specifically, their licensed pharmacists, in patronizing Albertsons Pharmacies.

60. Defendants have a duty to reveal the entire truth of its activities and practices once communications are provided to Plaintiff London and the Class regarding uses of patient prescription information.

61. In fact, Defendants suppress or conceal the true facts and fail to disclose, *inter alia*:

a) That patient prescription information will be used as detailed herein;

b) That Defendants receive finds and monies for patient prescription information belong to Albertsons Pharmacy patients;

c) That Defendants will not reveal or share the financial benefit thus received by its use of patient prescriptions.

62. The Defendants acted untruthfully and suppressed facts causing damage to Plaintiff London and the Class justifying the payment of punitive damages.

FIFTH CAUSE OF ACTION

Breach of Privacy
(Against All Defendants)

63. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

64. At all relevant times, Plaintiff London and the Class members had a legally protected privacy interest as directed by the California Supreme Court in Hill v. National Collegiate Athletic Ass'n (1994) 7 Cal.4th 1.

65. Plaintiff London and the Class acted reasonably in expecting that their prescription information collected for one purpose would not then be data based and used for another without knowledge or consent.

66. The conduct of Defendants was highly offensive and unreasonable and deprived Plaintiff London and the Class of the value of his/her property interest. Plaintiff London and the Class acted at all times consistent with their expectation that this privacy interest would be protected.

67. Defendants intentionally allowed and encouraged the stockpiling of private prescription information for one purpose and then used said private prescription information for another purpose.

68. Defendants are accordingly liable for violations of constitutional privacy and, given Defendants' deception, properly subject to punitive damages.

SIXTH CAUSE OF ACTION

Unjust Enrichment
(Against All Defendants)

69. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

70. The use and sale of the pharmacy records and prescription information of Plaintiff and other Albertsons Pharmacy patients by Defendants without first obtaining the express authorization of Plaintiff and each member of the Class violates Cal. Civil Code § 56.10(a), (d) and (e) and in breach of Defendants' fiduciary and other duties owing to Plaintiff and members of the Class.

71. Accordingly, and by virtue of the above allegations and claims asserted herein, Plaintiff on behalf of himself and in his representative capacity, seeks an order of this Court preliminarily and permanently enjoining Defendants from further using and selling their patients' confidential medical information as alleged herein. Plaintiff also seeks an order requiring each Defendant to:

a. Immediately cease its unlawful acts and practices;

b. Make full restitution of all monies wrongfully obtained; and

c. Disgorge all ill-gotten revenues and/or profits.

SEVENTH CAUSE OF ACTION

Trespass to Personalty
(Against All Defendants)

72. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

73. Defendants' activities as described by this complaint in the unauthorized use of the prescription information belonging to Plaintiff and the Class intentionally interferes with the possession of the personal property owned by Plaintiff and each Class member.

74. Defendants' activities were not authorized or permitted under the circumstances and proximately damaged Plaintiff and the Class members in that the value/benefit realized by Defendants for their unauthorized and unpermitted use of such personalty could properly have been realized by Plaintiff and the Class if not prevented by Defendants activities. Defendants' use of Plaintiff and the Class members' prescription information diminished the value of their personal property interests through practices at no time authorized.

75. Plaintiff and the Class seek, *inter alia*, to enjoin Defendants' practices.

EIGHTH CAUSE OF ACTION

Violation of Unfair Competition Laws (Against All Defendants)

76. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

77. By engaging in the acts and practices disguised herein, Defendants have committed one or more unfair, deceptive and illegal business practices within the meaning of California Business and Professions Code §§17200, et seq.

78. Defendants' acts and practices alleged in the Complaint constitute a course of unfair, fraudulent and/or illegal business practices within the meaning of California Business and Professions Code §§17200 including, but not limited to, the following:

A. Violation of the California Constitution, Article I, Section 1, (protecting California residents' inalienable privacy rights);

B. Violation of the Confidentiality of Medical Information Act (CMIA"), Civil Code §§ 56, *et seq.*, which, *inter alia*, at § 56.10, *et al.*, states:

1. **Prohibition on Unauthorized Disclosure of Medical Information**

> (a) No provider of health care, health care service plan, or contractor[3] shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization. . . . (emphasis added)
>
> * * * *
>
> (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, or otherwise use any medical information for any purpose not

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[3] Pharmacists and pharmacies are licensed pursuant to Chapter 9 of Division 2 of the Business and Professions Code and thus fall within the statutory definition relating to the regulation of health care set forth at CC §56.05(d). *See* Cal. Bus. & Prof. Code, §§ 4001, *et seq.*

> necessary to provide health care services to the patient.[4] (emphasis added)
>
> (e) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no contractor or corporation and its subsidiaries and affiliates shall further disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan or insurer or self-insured employer received under this section to any person or entity that is not engaged in providing direct health care services to the patient or his or her provider of health care or health care service plan or insurer or self-insured employer. (emphasis added)

C. Violation of the Confidentiality of Medical Information Act, Civil Code §§56, *et seq.*, which, at §56.101 states:

> **Destruction of Medical Records**
>
> Every provider of health care, health care service plan, pharmaceutical company, or contractor who creates, maintains, preserves, stores, abandons, destroys, or disposes of medical records shall do so in a manner that preserves the confidentiality of the information contained therein. . . .

D. Violation of § 4156 of California Business and Professions Code making it unlawful for a pharmacy corporation to engage in unprofessional conduct including failure to follow California Business and Professions Code §651;

E. Violating Code of Pharmacy Regulations § 1704 (Title 16, Division 17), to which states:

> **§ 1704: Unauthorized Disclosure of Prescriptions**
> No pharmacist shall exhibit, discuss, or reveal the contents of any prescription, the therapeutic effect thereof, the nature, extent, or degree of illness suffered by any patient or any medical information furnished by the prescriber with any person other than the patient or his or her authorized representative, the prescriber or other licensed practitioner than caring for the patient, another licensed pharmacist serving the patient, or a person duly authorized by law to receive such information.

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[4] Effective January 1, 2004, this paragraph was amended to include the words "use for marketing" to clarify prohibited uses of confidential medical information (*i.e.* (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan, contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, **use for marketing**, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.

79. Defendants' acts and practices as alleged herein are unfair because the utility of the conduct is outweighed by the gravity of the harm it causes and because if offends established public policy or is immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers. Defendants' wrongful conduct includes violation of numerous consumer laws and public protection as alleged herein or violates the spirit of these laws or otherwise significantly threatens or harms consumers. Defendants' wrongful conduct causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.

80. Pursuant to California Business & Professions Code §17203, Plaintiff London and the Class seek, *inter alia*, a temporary, preliminary and/or permanent order from this Court prohibiting Defendants from continuing to engage in the unlawful or unfair business acts or practices set forth in this Complaint.

81. Pursuant to California Business and Professions Code §17200 *et seq.*, Plaintiff London, individually and on behalf the general public and the Class, seeks restitution, disgorgement, injunctive relief and all other relief from Defendants as allowed under California Business and Professions Code §17200, *et seq.*

NINTH CAUSE OF ACTION

Violation of the Consumers Legal Remedies Act
(Against All Defendants)

82. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 40, inclusive, as though set forth at length herein.

83. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code §§ 1750, *et seq.*

84. As more fully alleged above, the conduct of the Defendants was intended to and did, in fact, deceive and mislead Plaintiff London and other Class member consumers regarding the true nature and extent of Defendants' ongoing practice of using and selling prescription data and information relating to Plaintiff and other members of the Class to data mining companies (such as IMS Health, Inc. and Verispan, LLC) without first obtaining the patient's express written

authorization. As a result of these non-disclosures, Defendants have violated, and continue to violate, the CLRA in, at least, the following respects:

(a) In violation of § 1770(a)(4) of the CLRA, the Defendants' acts and practices constitute the use of deceptive and misleading representations in connection with the providing of pharmacy services in question;

(b) In violation of § 1770(a)(5) of the CLRA, Defendants' acts and practices constitute representations that the advertised pharmacy services in question have characteristics, uses and benefits which they do not;

(c) In violation of § 1770(a)(9) of the CLRA, Defendants' acts and practices constitute the advertisement of pharmacy services without the intent to provide such services as represented; and

(d) In violation of § 1770(a)(14) of the CLRA, Defendants' acts and practices constitute representations that the pharmacy services in question confer or involve rights, remedies, or obligations which they do not have, or which are prohibited by law.

85. Pursuant to § 1782(a) of the CLRA, in conjunction with the filing of this action, while the complaint is an appropriate notice of violation, Plaintiff London will separately notify Defendants New Albertson's and Cerberus by certified mail, return receipt requested, of the particular violations of § 1770 of the CLRA and demand that Defendants remedy the actions described above and give notice to all similarly affected California consumers of intention to do so.

86. If Defendants fail to respond to Plaintiff's demand within 30 days of this notice, pursuant to § 1782(d) of the CLRA, Plaintiff will amend this Complaint to request actual damages, plus punitive damages, interest and attorneys' fees. Additionally, Plaintiff will seek to recover up to $5,000 per eligible Class members as provided for under § 1780(b) of the CLRA. Accordingly, at the present time (and without prejudice to Plaintiff London's right to further amendment), pursuant to § 1782(d) of the CLRA, Plaintiff only seeks an order enjoining the above-described wrongful acts and practices of Defendants, plus costs and attorneys' fees, and any other relief which the Court deems proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff London prays for judgment against Defendants New Albertson's and Cerberus as follows:

1. For all declaratory and equitable relief reasonably available including enjoining Defendants from the further sale of prescription medical data and information;

2. For an order certifying a Class as deemed appropriate relative to the above causes of action;

3. Plaintiff seeks an order requiring that Defendants disgorge the full monetary benefit received as a result of any act or practice declared by this Court to be an unlawful, misleading, deceptive or unfair business act or practice;

4. Compensatory damages as permitted under the CLRA in an amount to be proven at trial, including any other damages provided for by statute;

5. Compensatory and statutory damages as permitted under the CMIA;

6. Punitive damages as permitted under the CLRA in an amount to be proven at trial;

7. Treble damages pursuant to Civil Code § 3345;

8. Pre- and post-judgment interest;

9. For attorneys fees pursuant to, *inter alia*, the private Attorney General doctrine and/or Cal. Code Civ. Proc. § 1021.5 as may be appropriate, and for all costs of suit incurred herein; and

10. For such other and further relief as this Court may deem just and proper.

JURY REQUEST

Plaintiff hereby requests a trial by jury.

Dated: May ___, 2008

FINKELSTEIN & KRINSK LLP

DRAFT

By:______________________________
Jeffrey R. Krinsk

Mark L. Knutson
William R. Restis
501 West Broadway, Suite 1250
San Diego, California 92101-3579

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Ship Date: 16MAY08
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System#: 7850683/INET8010
Account#: S *********

Delivery Address Bar Code

SHIP TO: 9499323600 BILL SENDER
KATHLENE LOWE
DORSEY & WHITNEY
38 TECHNOLOGY DR STE 100

IRVINE, CA 926185312

Ref # 4768.02
Invoice #
PO #
Dept #

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Attorneys for Defendant
NEW ALBERTSON'S, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	CASE NO.: 08-1173 HC AB Assigned to: Hon. Marilyn Huff **NOTICE OF CONSTITUTIONAL CHALLENGE TO STATE STATUTES** **SPECIAL BRIEFING SCHEDULE ORDERED [CivLR 7.1 E(8)]** **Hearing:** Date: September 29, 2008 Time: 10:30 a.m. Courtroom: 13, Fifth Floor Complaint filed: May 29, 2008

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TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

Pursuant to Fed. R. Civ. Proc. 5.1(a)(1)(B), Defendant New Albertson's, Inc. ("New Albertson's") respectfully files this Notice of the August 14, 2008 filing of a motion to dismiss this action based, among other reasons, on its assertion that First Amendment to the United State Constitution bars the application of three California statutes to the Conduct at Issue (defined below). New Albertson's does not challenge the constitutionality of either statute on its face, and instead challenges them only as applied to the Conduct at Issue.

The Conduct at Issue is New Albertson's alleged sale of "anonymized" pharmacy records to third parties. "Anonymized," as used herein, means that all such records have been stripped of all "medical information" (as that term is defined in Cal. Civil Code § 56.05(g)) prior to their transmission to any third party.

New Albertson's asserts in its motion to dismiss that the First Amendment prevents application of the following California statutes to the Conduct at Issue:

1. The California Confidentiality of Medical Information Act ("CMIA"), Cal. Civil Code §§ 56 *et seq.*;

2. The California Unfair Competition Law ("UCL"), Cal. Business & Professions Code §§ 17200 *et seq.*; *and*

3. The Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; *and*

Pursuant to Rule 5.1(a)(2), New Albertson's further certifies that it has served this Notice and all filings relating to its motion to dismiss on the Attorney General of the State of California, as reflected in the Proof of Service filed concurrently herewith.

Dated: August 14, 2008

DORSEY & WHITNEY LLP

By: *s/ Kent J. Schmidt*
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KENT J. SCHMIDT
JOHN P. CLEVELAND
Attorneys for Defendant NEW ALBERTSON'S, INC.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, vs. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	CASE NO.: 08-1173 HC AB Assigned to: Hon. Marilyn Huff **PROOF OF SERVICE** Complaint filed: May 29, 2008

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I, Kent J. Schmidt, certify and declare as follows:

I am member of the bar of this court and counsel for Defendant New Albertson's, Inc. I am over the age of 18 and not a party to the within entitled action. My business address is 38 Technology Drive, Suite 100, Irvine, CA 92618.

On August 14, 2008, I caused service of the following documents

(1) NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT;

(2) MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT NEW ALBERTSON'S, INC. IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT;

(3) DECLARATION OF KATHLENE W. LOWE IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT; and

(4) NOTICE OF CONSTITUTIONAL CHALLENGE TO STATE STATUTES

on Jeffrey Krinsk (JRK@classactionlaw.com) and Jason Baim (jbaim@milbank.com) by electronically filing the documents with the Clerk of the District Court using its ECF System, which electronically notifies them of the filing and provides access to the documents.

Also on August 14, 2008, I caused a paper copy of those documents (listed above) to be placed in the United States mail, certified mail, return receipt requested, postage prepaid and sent to the following address.

Office of the Attorney General
State of California
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of August, 2008, at Irvine, California.

s/ Kent J. Schmidt
Kent J. Schmidt